TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 245.

THE MERCANTILE TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

MELVILLE D. HENSEY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 2, 1906.

(20,170.)

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In the Court of Appeals of the District of Columbia.

No. 1629.

THE MERCANTILE TRUST COMPANY, a Corporation, Appellant,
vs.
MELVILLE D. HENSEY.

a Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 *Declaration.*

Filed July 23, 1901.

In the Supreme Court of the District of Columbia.

Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

The plaintiff, Melville D. Hensey, sues the defendant, The Mercantile Trust Company, a corporation, for that whereas defendant heretofore, to wit, on the twenty-fourth day of January in the year of our Lord one thousand nine hundred, at the city of Washington, District of Columbia, by its certain writing obligatory sealed with its seal and now shown to the court here, the day whereof is the day and year last above written, acknowledged itself to be held and firmly bound unto the plaintiff in the sum of fifty thousand dollars

($50,000.00) to be paid to the said plaintiff; yet the said defendant although requested so to do, has not as yet paid the said sum of money or any part thereof to the said plaintiff, but has wholly neglected and refused and still neglects and refuses so to do.

Wherefore the plaintiff claims the sum of fifty thousand dollars ($50,000.00) besides costs of this suit.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

2 The defendant is to plead hereto, on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

Plea.

Filed October 22, 1901.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO., a Corporation.

Now comes the defendant, The Mercantile Trust Co., and for plea to the plaintiff's declaration filed herein, says that the said supposed bond or writing obligatory set out and described in said declaration is not its deed.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *ss:*

Percy H. Russell being duly sworn deposes and says, that he is the duly authorized local agent and representative of The Mercantile Trust Co., the defendant in the above entitled cause, and that the plea hereunto annexed is true in substance and form.

PERCY H. RUSSELL.

3 Subscribed and sworn to before me this 21st day of October, 1901.

H. R. HOWENSTEIN,
Notary Public.

[NOTARIAL SEAL.]

Amended Declaration.

Filed November 13, 1901.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,

vs.

THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

And now the plaintiff, by Birney & Woodard, his attorneys, and by leave of the Court amends his declaration by adding a further and second count, to wit:

Second Count.

The plaintiff, Melville D. Hensey, sues the defendant, The Mercantile Trust Company, a foreign corporation organized under the laws of Pennsylvania and doing business in the District of Columbia, for that whereas, the said defendant, The Mercantile Trust Company, as surety, and one William S. Jones, as principal, heretofore, to-wit, on the 24th day of January, 1900, at the City of Washington, District of Columbia, by their certain writing obligatory, sealed with their seals, and now shown to the Court here, the date whereof

4 is the day and year last above written, acknowledged themselves to be jointly and severally held and firmly bound unto the plaintiff in the sum of Fifty Thousand (50,000.00) Dollars, to be paid to the said plaintiff; yet the said William S. Jones and the said defendant, The Mercantile Trust Company, although requested so to do, have not, nor has either of them, as yet paid the said sum of money or any part thereof, to the plaintiff, but have wholly neglected and refused, and still neglect and refuse so to do.

Wherefore, the plaintiff brings his suit and claims the sum of Fifty Thousand (50,000.00) Dollars, besides costs of this suit.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

Plea to Amended Declaration.

Filed January 25, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST COMPANY.

For Plea to the amended Declaration the Defendant by Hayden Johnson and John Ridout, his Attorneys, comes and defends the wrong and injury when &c., and craves oyer of the writing obligatory in the said amended declaration mentioned, and it is read to him &c., and of the condition of the said writing obligatory and it is read to him in these words:—

5 "Whereas, the said obligee did on the 24th day of January, A. D. 1900, enter into and execute a certain contract with the said principal for the erection and completion within seven months from the date hereof, of Twenty-one brick dwelling houses located respectively on Lots 30, 31, 32, 33, 34, and 35, Block 3, Lots 32, 33, and 34, Block 5,—and Lots 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38, Block 6, in Seymour W. Tulloch *et al.'s* Subdivision of Lots in Washington Heights, all according to the plans and specifications provided for the same, and the said obligee having required said principal to give bond to protect the said obligee against any loss arising out of or by reason of the non-performance of any of the covenants contained in the said contract to be performed by the said principal.

Now the condition of this bond is such, that if the said principal shall duly and faithfully perform and fulfill all and every the conditions of said contract above recited of his part to be kept and performed and shall keep harmless and protect the said obligee from and against all loss by reason of the non-fulfillment by the said principal of the covenants contained in the said contract to be performed by him as aforesaid, and also against actual loss by reason of any and all claims, defects, errors, objections, liens and encumbrances, arising from the non-fulfillment by the said principal of the said covenants, then this obligation to be void, otherwise to be and remain in full force and effect."

Which being read and heard, the said defendant says that the said Plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because it says that the said

6 William S. Jones, the principal named in the said writing obligatory, did from time to time and at all times, after the making of the said writing obligatory and the said condition thereof,

well and truly observe, perform, fulfil and keep all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory specified comprised and mentioned, in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept according to the tenor and effect true intent and meaning of the said condition of the said writing obligatory, and this it is ready to verify, wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action against it.

HAYDEN JOHNSON,
JOHN RIDOUT,
Attorneys for Defendant.

Joinder of Issue on Plea to First Count in Declaration.

Filed February 14, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 44882.
MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

Comes now here the plaintiff and joins issue in defendant's plea to the first count of his said declaration herein filed.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

7 Take notice that the issue joined in the above entitled cause will be tried at the next term of this court.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

NOTE.—The clerk will please calendar the above entitled cause for trial at the next term of this court.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

JOHN RIDOUT AND
HAYDEN JOHNSON,
Attorneys for Defendant, and
BIRNEY AND WOODARD,
Attorneys for Plaintiff.

Last pleading filed ——, 1902.

Demurrer to Plea to Second Count in Declaration.

Filed February 14, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

Comes now here the plaintiff by his attorneys, Birney & Woodard, and says that the plea of the defendant to the second count of plaintiff's declaration in this cause filed, is bad in substance.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

8 NOTE.—One of the matters of law intended to be argued upon the above demurrer is, that the said plea is bad for the reason that it does not state that the said defendant did, from time to time and at all times, well, and truly observe, perform, fulfill, and keep all and singular the conditions and agreements in the said contract in the said writing obligatory mentioned, but states only that the condition of the writing obligatory was well, truly, observed, etc.

Mr. Hayden Johnson, Washington, D. C.

DEAR SIR: Take notice that the above demurrer will be called for hearing before Mr. Justice Clabaugh on Friday February 21, 1902, 10 o'clock a. m.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

Memorandum.

February 28, 1902.—Demurrer to plea to second count of declaration, overruled.

9 *Replication.*

Filed June 4, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

For replication plaintiff says that William S. Jones, the principal named in the said writing obligatory, did not from time to time and at all times after the making of the said writing obligatory and the said condition thereof, well and truly observe, perform, fulfill and keep all and singular the conditions and agreements in the said condition of the said writing obligatory specified, comprised and mentioned in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory, as the said defendant in its said plea to the second count of the plaintiff's declaration hath alleged. And for assigning breaches of the said condition of said writing obligatory, the plaintiff says that the said William S. Jones, the principal named in said writing obligatory, did not finish and complete the twenty-one brick dwellings in said writing obligatory mentioned within seven months from the date of said writing obligatory, that is to say, within seven months from the twenty-fourth day of January, 1900, but therein made default and did not complete said houses until, to wit, the month of July, 1901, to the great loss and damage of the plaintiff in the
10 sum of sixteen thousand five hundred (16,500.00) dollars.

And for a further breach of the condition of the said writing obligatory, the plaintiff says that the said William S. Jones, the principal named in said writing obligatory, did not finish and complete the said twenty-one brick dwelling houses on the twenty-one certain lots or parcels of ground mentioned in said writing obligatory, according to the contract, plans and specifications in said writing obligatory mentioned, but therein made default in the following particulars, that is to say:

That the carving on the stone coping was done in a very imperfect manner and not according to the specifications; and further, the copper ornaments were omitted on the torus at the base of the oriel window, contrary to the requirements of said specifications, and also the mouldings on the pilasters specified in said plans and specifications were omitted; and further, the said contract, plans and specifications required that the cheeks of the front area brick work should be properly pointed up, which cheeks were not properly pointed up,

and further, that the contract, plans and specifications required that the steps in the area of said houses shou'd be perfect and whole, but so it is that several of said steps were broken and not in perfect condition when placed in said buildings; and further, said contract, plans and specifications call for and require the front area coping to be clamped, but so it is that the said principal in the said writing obligatory did not clamp the front area coping; and further, that the said front area coping is not of the character required by said specifications and is inferior thereto; and further, that the said plans and specifications require and call for terrace steps of the same width as the entrance steps to the houses,
11 but so it is that said terrace steps as placed in said houses by the principal in the said writing obligatory mentioned, are of a less width than called for by said plans and specifications, and further, that the specifications call for the staircases to be of Georgia pine, whereas the said treads placed in said houses are of Virginia pine; and further, that by the plans and specifications the starting newells should be six inches square, whereas starting newells in said houses were made only four and one-half inches square; and further, that the specifications call for oak wall stringers, whereas the said principal in said writing obligatory substituted pine wall stringers in said buildings; and further, according to the said specifications the first floors in said buildings should be rubbed down with pumice stone and oil, which was not done by the principal named in said writing obligatory; and further, that the design of the panel wainscoting in the dining room is not in accordance with the detail drawings, and the wood in many panels is spliced and badly matched, contrary to the requirements of said contract, plans and specifications; and further, the corner blocks in the dining room ceiling are not in accordance with the contract, plans and specifications; and further, the cement finish in the kitchens and bath rooms is of an inferior quality and of poor workmanship, and not in accordance with the contract, plans and specifications; and further, the painting throughout the houses is inferior and the material called for in the specifications for the painting of said houses was not used and inferior materials were used; and further, the sash lifts are not of bronze metal and all flush pattern, as called for in said specifications, but are of
12 inferior material and pattern; and further, the plastering in said houses, and particularly around the gas outlets, is of an inferior kind and quality, and not in accordance with the contract, plans and specifications; and further, the tin work throughout said houses is not painted according to the standard required in said specifications; and further, the wall and floor tiling throughout the houses is not up to the standard of quality required in said specifications; and further, the hearths in said houses are not as called for in said plans and specifications; and further, the plumbing fixtures in said houses are not of the grade specified; and further, the supply pipes to the tanks in the bath rooms in said houses are of an inferior and defective finish and not in accordance with the contract, plans

and specifications; and further, the said contract, plans and specifications call for a coat and hat hooks in all closets, which have been omitted; and further, the woodwork around many of the windows is badly fitted, and is not of the character of finish called for by said contract, plans and specifications; and further, the fitting of the floors around pipes has not been done according to the contract, plans and specifications, but is done in an imperfect and careless manner; and further, the radiators in said houses and the valves connected therewith, are not of the character and style called for in said contract, plans and specifications; and further, the cement walks in the rear of said houses are defective and not according to the plans and specifications; and further, the cellar walls, where the same come in contact with the earth, have not been properly parge-d with cement, according to the requirements of said plans and specifications; and further, the fronts of said houses have not been
13 properly cleaned down, as required and called for in said specifications; and further, the glass in many of the windows is not as called for in said specifications, but is of an inferior grade and quality; and further, the brick work on some of said houses is done in an inferior manner; and further the fronts of said houses in general are not finished in accordance with the detail drawings, plans and specifications, whereby and by reason of all of said imperfections, omissions and defects the value of said houses has been lessened, to the great damage and loss of the plaintiff in the sum of Forty-three Thousand Eight Hundred and Thirty (43,830.00) Dollars, and the foregoing breaches of the said condition of said writing obligatory the plaintiff is ready to verify.

Wherefore, he prays judgment and his damages by him sustained by said breaches above assigned.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

Rejoinder.

Filed August 2, 1902.

In the Supreme Court of the District of Columbia.

Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO.

The defendant joins issue upon the Plaintiff's replication to the defendant's pleas.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Defendant.

14 *Order for Entry to Use, &c.*

Filed October 20, 1903.

In the Supreme Court of the District of Columbia the 15th Day of February, 1902.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Def't.

The Clerk of said Court will please enter this cause to the use of Frederick Mertens, and Park Agnew.

MELVILLE D. HENSEY, *Plaintiff.*
BIRNEY & WOODARD,
Attorneys for Plaintiff.

Assignment of Cause of Action to Frederick Mertens, &c.

Filed November 3, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST COMPANY, Defendant.

WASHINGTON, D. C., *October* 21, 1903.

For value received, I hereby sell, assign, transfer and set over to Frederick Mertens and Park Agnew my cause of action in the above entitled suit, and all the proceeds which may be derived from
15 the prosecution thereof and from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact.

In witness whereof, I have hereunto set my hand, this twenty-first day of October, 1903.

MELVILLE D. HENSEY.

Witness:
G. E. TRALLES.

Additional Pleas.

Filed January 16, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO.

Now comes the defendant, The Mercantile Trust Co., and with the leave of the court first had and obtained files these its additional pleas to the plaintiff's amended declaration.

I. The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's amended declaration filed herein to be numbered 2, says, that the said plaintiff at the commencement of this suit was and still is indebted to the defendant in the sum of $22000 with interest thereon at the rate of 6% per annum from the 24th day of January 1901: less the sum of $15,498 credited thereon on November
16 16, 1901; for that the plaintiff heretofore to wit on the 24th day of January 1901, by his certain promissory note now overdue, promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $2000 with interest at the rate of 6% per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid, except the sum of $1394.00 credited thereon on the 16th day of November 1901.

2. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $2000. with interest at the rate of six per cent per annum until paid, and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $1394.00 credited thereon on the 16th day of November 1901.

3. And that the plaintiff also to wit on the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $2000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity; and was dishonored; and the said note remains unpaid except the sum of $1394.00 credited
17 thereon on the 16th day of November 1901.

4. And that the plaintiff also on to wit the 24th day of

January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $2000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $1394.00 credited thereon on the 16th of November 1901.

5. And that the plaintiff also on to wit the 24th day of January 1901, by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000 with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

6. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and
18 the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

7. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

8. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

9. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now over due promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said

note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited
19 thereon on the 16th day of November 1901.

10. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

11. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

12. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now over due promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on
20 the 16th day of November 1901.

13. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now overdue promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

14. And that the plaintiff also on to wit the 24th day of January 1901 by his certain other promissory note now over due promised to pay to Edward S. Bond, or order, on or before one year after date the sum of $1000. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $697.00 credited thereon on the 16th day of November 1901.

15. And that the plaintiff also on to wit the 24th day of January 1901, by his certain other promissory note, now overdue promised to pay to Edward S. Bond or order on or before one year after date the sum of $500. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $348.50 credited thereon on
21 the 16th day of November 1901.

16. And that the plaintiff also on to wit the 24th day of January 1901, by his certain other promissory note, now overdue promised to pay to Edward S. Bond or order on or before one year after date the sum of $500. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $348.50 credited thereon on the 16th day of November 1901.

17. And that the plaintiff also on to wit the 24th day of January 1901 by his other promissory note, now over due promised to pay to Edward S. Bond or order on or before one year after date the sum of $500. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $348.50 credited thereon on the 16th day of November 1901.

18. And that the plaintiff also on to wit the 24th day of January 1901, by his certain other promissory note, now over due promised to pay to Edward S. Bond or order on or before one year after date the sum of $500. with interest at the rate of six per cent per annum until paid; and the said payee Edward S. Bond endorsed the said note without recourse to the defendant; and the same was duly presented for payment at maturity and was dishonored; and the said note remains unpaid except the sum of $512.50 credited thereon
22 on the 16th day of November 1901.

And the defendant is willing that the said sum of $22,000 with interest thereon at the rate of 6% per annum, less the sum of $15,498 credited thereon on November 16, 1901, be set off against the plaintiff's demand.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Deft.

The defendant for further plea to the plaintiff's amended declaration, filed herein, to be numbered Three, says, that the said plaintiff ought not to have or maintain his said action against this defendant for that by the terms of the contract between the plaintiff and William S. Jones to secure the performance of which the bond declared

upon in this case was given which said contract bears date the 24th day of January 1900 and the counterpart of which is here shown to the court it is required that the plaintiff furnish to the said William S. Jones the principal in said bond eighty-eight mantels to be used in the construction of the twenty-one houses mentioned in said contract, that the said mantels were to be supplied when the said houses should be in a condition to receive them. That the said plaintiff however regardless of the requirement of this provision of his contract and before the occurrence of any of the alleged breaches of the said bond by the defendant or its principal, broke and violated his said contract in this behalf and refused to supply said mantels. And the defendant says that the said contract being thus violated by the plaintiff the bond declared on became vitiated and of no effect in law.

23

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Deft.

The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's amended declaration, filed herein, to be numbered four, says, the said plaintiff ought not to have and maintain its said action against it for that the contract entered into between its principal, William S. Jones, and the plaintiff, which bears date the 24th day of January 1900 a counterpart of which is here shown to the court, the performance of which by the said William S. Jones the bond declared on by the said plaintiff was given to insure, required that the said Jones should construct twenty-one buildings for the plaintiff and receive in compensation therefor the sum of $89,250, and that the said Jones and this defendant did sufficiently construct and erect said buildings pursuant to the requirements of said contract, but the plaintiff did not and has never paid either to the said Jones or to this defendant as his surety and successor the said contract price so agreed to be paid by him nor has he ever paid any more thereof than the sum of $80,820, leaving a balance of $8,430. still due and unpaid by the plaintiff to the defendant as the successor of the said William S. Jones.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attys for Deft.

24 *Demurrer to Second and Third Pleas.*

Filed January 16, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST COMPANY, Defendant.

Comes now the plaintiff, by his attorneys, and craves over of the contract between the plaintiff and William S. Jones, dated January 24, 1900, and which is set out in the second and third of the three pleas filed in this cause January 15, 1904, and the same is read to him in the words and figures following, to wit: (Here insert); whereupon the plaintiff says that the said pleas are and each of them is bad in substance.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

NOTE.—Among the matters of law intended to be argued upon the hearing of the foregoing demurrer are the following:

1. It is apparent upon the face of the said contract, set up by the said second plea, that the provision therein for the furnishing of the eighty-eight (88) mantels referred to is not a condition precedent to the liability of the defendant.

2. That the facts set up in said plea, as controlled by the said contract, constitute no defense and do not vitiate the said contract
25 or relieve the defendant from liability thereon.

3. The third of said pleas is, in substance, a plea of performance and a repetition of the general plea of performance already filed.

4. Said third plea, as controlled by the said contract, of which profert is made, shows no facts which would relieve the defendant of liability.

Memorandum.

January 18, 1904.—Demurrer to additional pleas sustained with leave to plead over in five (5) days.

26 *Defendant's Additional Plea.*

Filed January 20, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO.

The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's declaration filed herein, to be numbered 5, says that the plaintiff at the commencement of this suit was and still is indebted to the defendant in the sum of $8,130 with interest thereon from the 29th day of June 1901, for that by the terms of the contract between William S. Jones and the plaintiff which bears date the 24th day of January 1900, a counterpart of which is here shown to the court, and to insure the performance of which by the said William S. Jones, the bond declared on in this case was given, it is required that the plaintiff pay to the said Jones the sum of $89,250 for the construction of the twenty-one houses therein mentioned. That the said Jones defaulted in the said work of construction of said houses and the defendant was called upon to complete and did complete the same. That the plaintiff has paid to the said Jones and the defendant in all on account of said contract price, only the sum of $81,120, leaving a balance due the defendant as the successor of the said Jones the sum of $8,130 which amount with interest as aforesaid, defendant is willing may be set off against the plaintiff's said demand.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Deft.

27 Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO.

The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's declaration filed herein, to be numbered 6, says that the plaintiff at the commencement of this suit was and still is indebted

to the defendant in the sum of $1,325, for that by the terms of the contract between William S. Jones and the plaintiff, which bears date the 24th day of January, 1900, a counterpart of which is here shown to the court, and to insure the performance of which by the said William S. Jones, the bond declared on in this case was given, it is required that the plaintiff, deliver to the said William S. Jones in addition to the contract price for the erection of the twenty-one houses therein mentioned, certain mantels then on storage at Ratcliff's Auction House, (being eighty-two mantels more or less), which were to be used in the construction of said houses. And the defendant says that there were a large number to wit 82 mantels on storage at said Auction House. That the said Jones defaulted in the said work of construction of said houses and the defendant was called upon to complete and did complete the same. That the plaintiff however violated the terms of his contract in this regard
28 and did not furnish, either to the said Jones or to the defendant as his successor any of said mantels or has he paid the said Jones or the defendant anything in lien thereof, and by reason of such failure on the part of the said plaintiff the defendant was obliged to purchase other mantels for said houses at an expense of to wit, $1325, and which amount the defendant is willing may be set off against the plaintiff"s demand.

JOHN RIDOUT,
HAYDEN JOHNSON,
Att'ys for Def't.

Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO.

The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's declaration filed herein, to be numbered 7, says that the plaintiff since the commencement of this suit became and still is indebted to the defendant in the sum of $3,285 with interest from the 13th day of August 1901, for that on to wit, the 13th day of August 1901, the defendant at the request of the plaintiff paid to B. H. Warner and Co., the holder of the first trust notes secured upon the plaintiff's property referred to in the said bond or writing obligatory declared on in this case, the sum of $3,285 as interest for six months on the loan of $109,500 secured thereby, and which said
29 amount the plaintiff has never repaid either in whole or in part to the defendant and which said amount with interest

as aforesaid the defendant is willing may be set off against the plaintiff's demand.

JOHN RIDOUT,
HAYDEN JOHNSON,
Att'ys for Def't.

Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO.

The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's declaration filed herein, to be numbered 8, says that before the bringing of this suit the said defendant and its principal William S. Jones, fully paid and discharged all damage and injury sustained by the plaintiff by reason of any violation of any of the covenants or conditions of said bond or writing obligatory in this case declared on.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Def't.

30 Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST CO.,

The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's declaration filed herein, to be numbered 9, says, that the plaintiff before the commencement of this suit was and still is indebted to the defendant in the sum of $6,570 with interest on $3,285 from the 18th day of January 1901, and with interest on $3,285, from January 22nd 1901, for that on to wit, the 18th day of January 1901, the defendant at the request of the plaintiff paid to the B. H. Warner Co. the holder of the first trust notes secured upon the plaintiff's property referred to in the said bond or writing obligatory declared on in this case the sum of $3,285 as interest for six months on the loan of $109,500 secured thereby, and on to wit

the 22nd day of January 1901, also at the request of the plaintiffs they paid the further sum of $3,285 in payment of another installment of interest for six months on account of said loan. And which two amounts aggregating the sum of $6,570 with interest as aforesaid the defendant is willing may be set off against the plaintiff's demand.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Deft.

31 Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

to-wit:

MELVILLE D. HENSEY,
vs.
THE MERCANTILE TRUST CO.

The defendant, The Mercantile Trust Co., for a further plea to the plaintiff's declaration filed herein, to be numbered 10, says, since the bringing of this suit it fully paid and discharged all damage and injury of any, sustained by the plaintiff by reason of any alleged violation of any of the covenants or conditions of said bond or writing obligatory in this case declared on, which had not been fully paid or discharged by it or its principal William S. Jones prior to the bringing of this suit.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attorneys for Deft.

32 *Demurrer to Defendant's Additional Pleas.*

Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST CO., Defendant.

Comes now the plaintiff, by his attorneys, and says that the defendant's pleas, to be numbered five (5) and six (6), are bad in substance.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

Note.

One of the matters of law intended to be argued is that the contract referred to in said pleas created no right in the defendant to require of the plaintiff the sums of money mentioned in the said pleas, the covenants of the plaintiff being to the said Jones and not with the defendant.

33 *Memorandum.*

January 21, 1904.—Demurrer to additional fifth and sixth pleas, overruled.

Plaintiff's Replication to Defendant's Pleas of Set-off.

Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST CO., Defendant.

Comes now the plaintiff, by his attorneys, and for replication to the pleas of the defendant numbered two (2) five (5) six (6) seven and nine, says that he did not promise in manner and form as alleged.

And as to the pleas of the defendant numbered eight and ten, this plaintiff hereby joins issue thereon.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

34 *Defendant's Rejoinder to Plaintiff's Replication &c.*

Filed January 21, 1904.

In the Supreme Court of the District of Columbia.

Law. 44822.

MELVILLE D. HENSEY
vs.
MERCANTILE TRUST COMPANY.

The defendant joins issue on the Plaintiff's replication to defendant's second, fifth, sixth, seventh and ninth pleas.

HAYDEN JOHNSON,
JNO. RIDOUT,
Attys. for Deft.

Memorandum.

May 11, 1905.—Leave to defendant to file further rejoinder.

Further Rejoinder.

Filed May 11, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
v.
MERCANTILE TRUST CO., Defendant.

The defendant for a further rejoinder, filed by leave of the court first obtained, to the plaintiff's replication (by assignment of
35 breaches) says that by the terms of the contract referred to in the said writing obligatory, it is, among other things, provided in substance as follows: That the work therein contracted for should be done agreeably to the drawings and specifications made by Melville D. Hensey, architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of said Bates Warren, or the architect placed in charge by him.

That said Bates Warren, pursuant to the terms of said contract, appointed William J. Palmer as architect, that said work was completed by said William S. Jones and the defendant acting for him, in a good, workmanlike, and substautial manner, to the satisfaction and under the direction of said William J. Palmer and according to his interpretation of the said plans and specifications and that he the said Wm. J. Palmer has testified to such completion by a writing or certificate under his hand in the following language:

JULY 29TH, 1901.

Bates Warren, Esq., Washington, D. C.

DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses, located on Vernon, California, Kalorama and Belmont avenues, by the Mercantile Trust Company of Pittsburg. The work has been done according to my interpretation of the plans and specifications and where deviations have been made from the plans and specifications, it has been where the same
36 were inconsistent and ambiguous, and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses.

Yours very truly, WILLIAM J. PALMER.

JOHN RIDOUT,
HAYDEN JOHNSON,
Attys. for Deft.

Demurrer to the Defendant's Further Rejoinder.

Filed May 11, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST CO., Defendant.

Comes now the plaintiff, by his attorneys, and says that the defendant's further rejoinder, filed May 11, 1905, is bad in subsatnce.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

NOTE.—Among the matters of law to be argued on the foregoing demurrer is:

1. By the terms of the said contract the certificate of the architect set out in the said further rejoinder is not conclusive of the right of the plaintiff to recover for the defects, omissions and alterations set out in the assignment of breaches.

37 *Memoranda.*

May 11, 1905.—Demurrer to further rejoinder sustained.

May 18, 1905.—Verdict for plaintiff for Eight thousand four hundred and sixty-eight dollars ($8468.00).

Motion in Arrest.

Filed May 19, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY,
vs.
MERCANTILE TRUST COMPANY.

Now comes the defendant by its attorneys and moves the Court to arrest the judgment on the verdict in this cause and for grounds of said motion, says:

That the declaration as amended contains two inconsistent counts.

That no evidence whatever in support of the first count was given and

That the verdict of the jury is general and does not refer to any particular count.

HAYDEN JOHNSON,
JOHN RIDOUT,
Attorneys for Defendant.

38 Messrs. Birney and Woodward, Attorneys for Plaintiff:

Please take notice that the above motion will be submitted to Mr. Chief Justice Clabaugh on Friday, May 26th, 1905 at ten o'clock A. M., or as soon thereafter as counsel can be heard.

HAYDEN JOHNSON,
JOHN RIDOUT,
Attorneys for Defendant.

Motion in Arrest Overruled, Judgment, Appeal.

Supreme Court of the District of Columbia.

MONDAY, *June 12th,* 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice Presiding.

* * * * * * *

No. 44822. At Law.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

Upon consideration of defendant's motion in arrest of judgment filed herein, it is ordered that said motion be, and is hereby overruled; to which ruling the defeadant's attorney noted exception.

Further, upon hearing defendant's motion for a new trial herein filed, it is ordered that said motion be, and is hereby overruled, and judgment is ordered. Whereupon it is considered and ad-
39 judged that the plaintiff herein recover of the defendant herein, the sum of Eight Thousand and Four Hundred and sixty-eight dollars, for his damages as aforesaid assessed, with interest thereon from this date, together with his costs of suit to be taxed by the Clerk and have execution thereof.

From the aforegoing, the defendant notes an appeal, and prays that bonds be fixed. Whereupon it is hereby ordered that defendant furnish bond herein in the sum of one hundred dollars, for costs or to operate as a supersedeas, in the sum of twelve thousand dollars, with surety or sureties to be approved by this court.

Further, upon motion the time within which to settle the bill of exceptions and to file a transcript of record in the Court of Appeals, is hereby extended to September 30th, 1905, inclusive.

Memoranda.

June 27, 1905.—Appeal bond filed.
September 21, 1905.—April Term prolonged thirty-eight (38) days to settle exceptions, and time to file record extended to October 15, 1905.
October 7, 1905.—Time to submit bill of exceptions and to file record extended to November 15, 1905.
October 30, 1905.—Time to file transcript extended to December 1st, 1905.

40 *Bill of Exceptions Approved.*

Supreme Court of the District of Columbia.

TUESDAY, *November 14th*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice Presiding.

No. 44822. At Law.

MELVILLE D. HENSEY, Pl'ff,
vs.
THE MERCANTILE TRUST CO., Def't.

Come now attorneys for defendant herein and present to the court the Bill of Exceptions taken at the trial of this cause, and pray that the same be signed and made of record now for then, which is accordingly done.

41 *Bill of Exceptions.*

Filed November 14, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY
vs.
THE MERCANTILE TRUST COMPANY.

Bill of Exceptions.

Be it rememberd that this action came on for trial before Mr. Chief Justice Claubaugh and a jury.

Whereupon, plaintiff, to maintain the issues upon his part joined, gave evidence tending to prove the due execution of the bond set out in the second count of the declaration as amended and said bond was read to the jury. It is in the usual form, is in the penalty of $50,000., and its condition reads as follows:

"Whereas the said obligee did, on the 24th day of January, A. D. 1900, enter into and execute a certain contract with the said principal for the erection and completion, within seven months from the date thereof, of 21 brick dwelling houses located respectively on lots 31, 32, 33, 34 and 35 block 3; lots 32, 33, and 34 block 5; and lots 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 block 6 in Seymour W. Tullock *et al.* subdivision of lots in Washington Heights, all according to the plans and specifications provided for the same; and the said obligee having required said principal to give bond to protect the said obligee against any loss arising out of or by reason of the non performance of any of the covenants contained in the said contract to be performed by the said principal.

Now the condition of this bond is such, that if the said principal shall duly and faithfully perform and fulfill all and every the
42 conditions of said contract, above recited, on his part to be kept and performed, and shall keep harmless and protect the said obligee from and against all loss by reason of the non-fulfillment by the said principal of the covenants contained in said contract, to be performed by him as aforesaid, and also against actual loss by reason of any and all claims, defects, errors, objections, liens and encumbrances, arising from the non-fulfillment by the said principal of the said covenants, then this obligation to be void; otherwise to be and remain in full force and effect.

This bond is issued upon the express condition that all the covenants and agreements contained in the said contract made by the said obligee and on his part to be kept and performed, for the pro-

tection of the said obligee and the said security shall be strictly kept and performed by the said obligee."

The plaintiff also gave evidence tending to prove the execution of the agreement referred to in the condition of said bond; said agreement bears date of January 24, 1900, is executed by plaintiff and Wm. S. Jones, and the relevant portions provide as follows:

"Articles of agreement made and entered into this 24th day of January, in the year one thousand nine hundred, between Melville D. Hensey (herein called the owner), of the city of Washington, in the District of Columbia, party hereto of the first part, and William S. Jones (herein called the contractor) of said city and District, party hereto of the second part.

The said party of the second part does hereby for himself, his heirs, executors or administrators, covenant, promise and agree to and with the said party of the first part, his executors, administrators or assigns, that he, the said party of the second part, his executors or administrators, shall and will for the consideration hereinafter mentioned on, or before the seven months from the date hereof, well and sufficiently, erect and replace all defective work
43 and finish the twenty-one brick dwelling-houses located upon lots numbered 30, 31, 32, 33, 34 and 35 in block numbered three (3), lots numbered 32, 33 and 34 in block numbered five (5), and lots numbered 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 in block numbered six (6) of Seymour W. Tullock's *et al.* subdivision of lots in Washington Heights, agreeably to the drawings and specifications made by Melville D. Hensey, architect, and which plans and specifications are signed by the said parties hereto and hereunto annexed, within the time aforesaid in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, and also shall and will find and provide such good, proper and sufficient material of all kind whatsoever, as shall be proper and sufficient for the completing and finishing all of said twenty-one houses, and other works of the said buildings mentioned in the said specifications for the sum of eighty-nine thousand, two hundred and fifty dollars, to be paid as set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part hereof. The mantels now stored (82 more or less) at the Radcliffe auction house on Penna. Ave. are to be furnished to the party of the second part by the party of the first part, free of charge. And the said party of the second part shall and will begin the work on said houses within two days after notice from the party of the first part and continue the work thereon until the same are fully completed. And the said party of the first part does hereby for himself, his heirs, executors, administrators or assigns, covenant, promise and agree, to and with the said party of the second part, his heirs, executors, administrators or
44 assigns, that he the said party of the first part, his heirs, executors, administrators or assigns, shall and will, in consid-

eration of the covenants and agreements being strictly performed and kept by the said party of the second part, as specified, well and truly pay, or cause to be paid unto the said party of the second part, his heirs, executors, administrators or assigns, the said sum of eighty-nine thousand, two hundred and fifty dollars ($89,250.00), to be paid to the said party of the second part as the work progresses in the manner and at the time set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part of this agreement.

Provided, that in each of the said cases, a certificate shall be obtained from and signed by the architect in charge, that the contractor is entitled to payment; said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications either in execution or materials, and further that the party of the second part shall furnish, if required, satisfactory evidence that no lien does or can exist upon the work.

It is hereby further agreed by and between the said parties:

First. The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings to the true meaning and intention of the said drawings and specifications, without any extra charge whatsoever.

Second. The contractor, at his own proper cost and charges,
45 is to provide all manner of materials and labor, scaffolding, implements, models, molds, and cartage of every description, for the due performance of the several erections.

* * * * * * *

Eighth. Should the contractor fail to finish the work at, or before, the time agreed upon he shall pay to the party of the first part the sum of fifty dollars for each and every day thereafter the said work shall remain unfinished, as and for liquidated damages, but for each and every day the progress of the work shall be delayed by the said party of the first part, one additional day beyond the time specified shall be allowed the contractor for the completion of the work by the party of the first part, and such additional days shall be claimed and granted at the time thereof.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first hereinbefore written.

(Signed) MELVILLE D. HENSEY. [SEAL.]
(Signed) WM. S. JONES. [SEAL.]

The schedule of payments to be made by the said Hensey to the said Jones, for the construction of said buildings, was offered in evidence and showed in substance that payments were to be made from time to time during the construction of said houses, and that the last payment provided for, to wit, $16,014. was to be made "when

the houses are fully completed, in accordance with the said agreement, and the plans and specifications prepared therefor."

The plaintiff also proved and gave in evidence the plans and specifications referred to in the said agreement and in said bond, the relevant parts of such specifications in addition to the detailed
46 directions for work and materials therein found being as follows:

Specifications.

For material to be furnished and labor to be performed in the erection and completion of twenty-one (21) residences * * * for Mr. Melville D. Hensey; to be built according to the plans and elevations and detail drawings, and these specifications prepared by M. D. Hensey, architect, but under the supervision of an architect to be appointed by Bates Warren, said architect appointed to take entire charge.

* * * * * * *

General Conditions.

The contractor will provide all the materials, new and of the best quality, and will execute and complete all the work as set forth in the specifications and drawings in the best and most workmanlike manner.

* * * * * * *

In all cases of doubt as to the meaning of the drawings reference is to be made to the architect in charge whose decision will be final. The drawings and specifications are intended to co-operate, and anything shown upon one or stated in the other is to be done and performed as if set forth in both.

It is agreed by counsel that the original agreement and the plans and specifications therein referred to may be used at the argument of this cause in the Court of Appeals with the same effect as if set out at length herein.

The plaintiff further gave evidence by several other witnesses, over the objection and exception of the defendant duly reserved, tending to prove that the said buildings were not complete until after August 24, 1901, and that the same were not completed according to said plans and specifications, in the particulars set forth in the as-
47 signments of breaches; and that the difference in value of the said houses by reason of omissions, structural defects and defective materials was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract, plans and specifications.

Thereupon the counsel for plaintiff called as a witness Mr. George C. Hough and among other things the witness was asked with great detail as to items, whether the work provided for by the drawings and specifications had been done in accordance therewith, to which ques-

tion counsel for the defendant objected on the ground that the architect was exclusively clothed with authority to decide such questions, but the Court overruled the objection and allowed the witness to answer, to which ruling counsel for defendant duly excepted.

Thereupon the witness testified in much detail that the work in many respects failed to meet these requirements.

He was then asked and over objection and exception duly reserved, allowed to answer as follows:

What would it have been fairly worth to take out the defective work, so far as it was possible to do so without taking the houses down, and make the houses conform to that extent to the plans and specifications.

Answer: "$2000 for each house."

Thereupon the plaintiff over defendant's objection and exception duly reserved, in his own behalf gave testimony tending to prove that in the erection of the said houses there were omissions of work and materials required by the plans and specifications, and that inferior materials were substituted for specified materials, and that the workmanship was in many respects below the requirements of said contract and specifications; and further that the houses were not completed until after August 24, 1901, and that for these reasons
48 the full amount of $89,250. was not paid to said Jones or the defendant, and that $8,630. and notes aggregating $21,000., parts of the contract price, were not paid by him, and that the mantels mentioned in the contract were never supplied by him.

And plaintiff further testified that no interest was ever paid by him on the $109,000. loan; that the conveyance to Bates Warren was for the benefit of plaintiff and other creditors; and that plaintiff after bringing this suit assigned his interest therein to Mertens and Agnew, who had furnished the bricks used in said houses, for which they had not been paid, the amount of whose claim he could not remember.

And further evidence was given on behalf of the plaintiff tending to prove that before the completion of the said houses, to wit, in July, 1901, the defendant came into possession of the said promissory notes for $21,000., secured by a deed of trust upon the said twenty-one houses, and that immediately upon the completion of said houses the defendant caused the same to be sold at auction, under the power of sale contained in the said deed of trust, and that defendant bought them at such sale at prices which were less than sufficient to discharge the said mortgage after the payment of prior liens, the deficiency being $9,222.00.

And said witness further gave evidence over defendant's duly reserved objection and exception tending to prove that said contractor Jones abandoned the work on said houses early in the fall of 1900, and said work was then taken up and continued by the defendant The Mercantile Trust Company; that work was carried on during the following winter, but there was no architect in charge; apparently one Frank H. Knight, a foreman employed by the de-

fendant, was in charge until the appointment of Mr. W. J. Palmer as architect in April, 1901.

And further gave evidence tending to prove that during the building of said houses the plaintiff frequently complained to the
49 defendant that they were not being constructed as required by the contract, plans and specifications.

And here the plaintiff rested.

And thereupon WILLIAM J. PALMER, a witness for the defendant, gave evidence tending to prove that for quite a period he was supervising architect of the twenty-one houses in dispute, appointed by Mr. Bates Warren by a paper which was given in evidence and reads as follows:

"APRIL 19, 1901.

Mr. William J. Palmer, architect, Washington, D. C.

DEAR SIR: I am required by the specifications for the houses being erected on Washington Heights by the Mercantile Trust Company for Messrs. Tulloch *et al.* to designate and appoint an architect to be in charge of the construction of said houses, and pursuant to such requirement I hereby designate and appoint you as such architect, and request that you forthwith, if agreeable to you, take charge of the same. Before doing so however, you must make some arrangement as to your compensation therefor, as I will in no way be responsible for such charges as you may make for superintending the construction of the houses, and this letter is written only for the purpose of indicating my choice of the architect to be in charge. If you conclude to accept this appointment, please advise me of the same at your earliest convenience. I would suggest that you call upon the representative of the Mercantile Trust Company, Mr. Percy H. Russell, to make arrangements for your compensation above referred to.

Very truly,
(Signed) BATES WARREN.

That before that time, April 19, 1901, he had no connection with the work, but after such appointment he supervised the work on all the houses but the three on Kalorama Avenue; with these
50 three he had nothing to do. Supervised the work on the others until they were finished, and gave a certificate which was offered in evidence and reads as follows:

"JULY 29, 1901.

Bates Warren, Esq., Washington, D. C.

DEAR SIR: It gives me pleasure to report to you the completion of the 21 Kellogg houses on Vernon, California Kalorama and Belmont Avenues, by the Mercantile Trust Company of Pittsburg. The work has been done according to my interpretation of the plans and specifications and where deviations have been made from the plans and specifications it has been where the same were inconsistent and

ambiguous, and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses.

Very truly yours, WILLIAM J. PALMER.

And the witness gave evidence in detail tending to corroborate in part the statements of his said certificate.

And upon cross-examination said witness testified in substance that a large part of the work upon the houses in question was completed when he commenced his supervision; that he did not regard it as his duty to change conditions there excepting where the brickwork had been destroyed by vandalism, and tore nothing down unless it was in danger of falling down. Had nothing to do with the work which was already done, and was only to supervise the completion of the work. The witness testified further that on June 17, 1901, he wrote to Mr. S. W. Tullock a letter which was produced in evidence, which letter reviewed a large number of alleged defects in the work on the houses, recognized some as existing and stated they would be remedied, and declared that other objections were not well taken, and contained a further statement as follows: "You will appreciate, I
51 have no doubt, the difficulty of my position having but recently been appointed (April 19th, 1901) as architect in charge, my position really becomes rather referential than administrative and supervisory," and said witness explained that by the said statement he thought he meant that most of the work had been done, and it was difficult for him to rectify work that was already done badly.

Whereupon the defendant by other witnesses gave evidence tending to prove that the buildings had been completed in accordance with the said plans and specifications; and the defendant also gave evidence tending to prove the various items of set offs set up in its pleas and which aggregate $29,032., and thereupon defendant rested.

Whereupon the plaintiff gave evidence tending to contradict the testimony of the defendant's witnesses.

And thereupon both parties announced their testimony as closed.

The foregoing was all the evidence in the case.

Thereupon, upon all the evidence in the case, the plaintiff prayed the court to instruct the jury as follows:

1. If the jury find from the evidence that the houses in question in this cause were not completed until after August 24, 1900, then they are instructed that for every day after such time that the work remained unfinished, plaintiff is entitled to recover $50.00 and they should so find.

2. If the jury find from the evidence that the buildings in question were not constructed in accordance with the contract plans and specifications therefor, then they are instructed that the plaintiff is entitled to recover such damages as he may have proved re-
52 sulted therefrom and the measure of his recovery on this ground is the difference between what the houses were worth

when completed, and what they would have been worth had they been completed as required by the contract.

3. Under the evidence in this case the defendant is not entitled to be allowed by way of set offs for payments claimed to have been made by it to B. H. Warner Company, on account of interest, as set out in the seventh and ninth pleas, and the jury should disallow such claim.

To which prayers the counsel for defendant objected, but the court over-ruled the objection and granted the first and second prayers, to which ruling counsel for the defendant separately excepted, and the said two prayers were afterwards read to the jury. The court rejected the said third prayer.

Thereupon, upon all the evidence in the case, the defendant's counsel prayed the court to instruct the jury as follows:

53 1. The jury is instructed that upon all the evidence in this action that the plaintiff is not entitled to recover any damages against defendant by reason of any structural defects claimed to exist in the erection of the houses referred to in this action, and in respect of this claim their verdict should be for defendant.

2. The jury are instructed that the certificate of William J. Palmer accepting the houses, made the subject of this litigation, is conclusive of their completion according to the terms of the contract, and they are therefore not to consider any structural defects claimed to exist therein and in this respect their verdict should be in favor of defendant.

3. The jury are instructed upon all the evidence in this action that the plaintiff is not entitled to recover against the defendant for any damages claimed to have been incurred by reason of delay in construction of the houses referred to in this suit, and in respect of this claim their verdict should be in favor of defendant.

4. The jury are instructed that upon all the evidence in this action, tion, that the plaintiff is not entitled to recover any damages, either for structural defects alleged to exist, or for damages for delay alleged to have been suffered in respect to the house known as the Riley house.

5. The jury are instructed that upon all the evidence in this cause, the plaintiff is not entitled to recover any damages, either for structural defects alleged to exist, or for damages for delay alleged to have been suffered in respect of the six houses know as the Tulloch houses.

6. The jury are instructed that the sum of $9,855 representing interest paid by the defendant for the benefit of the plaintiff on the first trust indebtedness secured upon the houses involved in this

54 action should be credited by them upon any amount found by them as damages, if any such they find, for delay *or defects* in completion of said houses.

7. The jury are instructed that the balance of $8,630.00 admitted by the plaintiff to be still unpaid to the defendant on account of the contract price of $89,250.00 for the erection of the houses in dispute in this cause, should be credited upon any damages if any such they find, for delay *or defects* in the construction of said houses.

8. The jury are instructed that the sum of $1,325.00 being the value of the 82 mantels referred to in the pleadings and testimony in this cause, should be deducted by them from any sum found by them to be due in respect of damages, if any such they find, for delay *or defects* in the construction of said houses.

9. The jury are instructed that the sum of $9,222.00 balance due on the notes set out in the plea No. — should be credited by them upon such sum if any, as they may find against the defendant in respect to damages for delay *or defects* in the completion of the houses referred to in this suit.

10. The jury are instructed that if the credits allowed by them to the defendant exceed in the aggregate the damages, if any, which they may find against the defendant, then for such excess, the defendant is entitled to a verdict against the plaintiff and they should render their verdict accordingly.

11. The jury are instructed that there is no evidence in this case legally sufficient to justify them, in any event, in finding a verdict in favor of plaintiff on account of alleged structural defects, for more than nominal damages.

12. The jury are instructed that, in considering the ques-
55 tion of structural defects, they are not at liberty to consider anything but omissions, if any they find, and are not entitled to consider substitutions of materials or modifications of construction made with the approval of the architect under his interpretation of the plans and specifications

13. The jury are instructed that by the contract which is the foundation of this action, and the appointment thereunder by
56 Bates Warren, trustee, of William J. Palmer as architect was given authority to decide all doubtful questions arising between the drawings and specifications, and in respect of all such questions, his decision is final and binds both parties to this suit, unless the jury shall find that such decisions or any of them were made either in actual bad faith or so negligently as to amount to bad faith on the part of the said architect.

Of which prayers the Court granted the 6th, 7th, 8th, 9th and 10th, and the 13th was conceded by Plaintiff's counsel. The 1st, 2d, 3d, 4th, 5th 11th and 12th were rejected, to which rulings of the Court in refusing to give the said rejected prayers, the defendant as to each prayer so refused separately and severally excepted none of the prayers refused was read to the jury; the defendant's granted prayers and those conceded were afterwards read to the jury.

Thereupon the Court, of his own motion, charged the jury in substance as follows:

First. That the plaintiff was entitled to recover damages at the rate of $50. a day, for each day after the expiration of seven months from the date of the agreement, that the houses were not finished, the number of such days to be determined by the jury. And the Court read to the jury the plaintiff's first prayer for instructions.

Second. That under its pleas of set off the defendant was entitled

to recover against the plaintiff the several amounts claimed by it, being $29,032, as set out in the prayers asked in behalf of the defendant.

Third. That if the houses in question were not completed, in substantial compliance with the contract, plans and specifications offered in evidence, the plaintiff was entitled to recover against the
57 defendant for whatever amount the jury might find that the value of the houses was affected by any failure in respect to the building of the houses in accordance with the contract and plans and specifications; but if such houses were built in substantial compliance with the contract, plans and specifications, the verdict in this branch of the case should be for the defendant.

And further charged that if the buildings were not constructed in accordance with the contract, plans and specifications, the measure of the plaintiff's right to recover on this ground is as stated in the second instruction asked on behalf of the plaintiff, which was read to the jury.

And further charged that the burden of proof was upon the plaintiff to establish by the fair weight of evidence that the houses were not constructed according to the plans and specifications.

Fourth: The Court read to the jury prayer No. 12 of the defendant (granted), as follows: "The jury are instructed that, in considering the question of structural defects, they are not at liberty to consider anything but omissions, if any they find, and are not entitled to consider substitutions of materials or modifications of construction made with the approval of the architect under his interpretation of the plans and specifications."

And the Court thereupon proceeded as follows:

"That is to say, gentlemen, putting it in another way, that under this contract an architect was chosen, and the contract provided that wherever there is any doubtful construction to be given as between the drawings and specifications, if there happens to be any antagonism between the two, and if it cannot be readily seen what it means, then the architect was to decise finally upon that question, and his decision was final in the premises, unless you find that he acted in bad faith, or was so negligent in his duty as to amount to
58 bad faith in the premises. Wherever there was any doubtful question arising between the drawings and specifications, then the architect's duty was to decide it, and his decision was final and binding on all the parties to this cause.

To so much of the charge of the Court as repeated the plaintiff's prayers, counsel for defendant objected, but the Court overruled the objection, and allowed the charge to stand, to which ruling counsel for defendant excepted.

All said exceptions were separately and severally reserved, and they were all separately and severally noted by the Justice presiding, upon his minutes, before the jury retired to consider their verdict.

Thereupon the jury retired to consider of their verdict and after-

wards returned into the Court and rendered a verdict in favor of the plaintiff for $8468.00.

Thereafter the defendant, by its attorney, filed in Court in this cause its motion in arrest of judgment as follows:

"In the Supreme Court of the District of Columbia.

At Law. No. —.

MELVILLE D. HENSEY
vs.
MERCANTILE TRUST COMPANY.

Now comes the defendant by its attorneys and moves the Court to arrest the judgment on the verdict in this cause and for grounds of said motion says:

That the declaration as amended contains two inconsistent counts;

That no evidence whatever in support of the first count was given; and

59 That the verdict of the jury is general and does not refer to any particular count.

HAYDEN JOHNSON,
JOHN RIDOUT,
Attorneys for Defendant."

Which motion afterwards came on to be heard, and after argument by counsel, was over-ruled, to which ruling counsel for defendant excepted, and said exception was duly noted by the Justice presiding upon his minutes.

And the defendant now prays the Court to settle and sign this Bill of Exceptions in order that the same may be made matter of record, which is accordingly done this 14th day of November, 1905, now for then.

HARRY M. CLABAUGH,
Chief Justice.

Settled by agreement.
BIRNEY & WOODARD,
Att'ys for Pl'ff.
HAYDEN JOHNSON,
JOHN RIDOUT,
Att'ys for Def't.

60 *Designation to Clerk for Preparation of Transcript.*

Filed November 15, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY,
vs.
MERCANTILE TRUST COMPANY.

The clerk will please include in the transcript on appeal herein, the following:

1. Declaration.
2. Plea thereto.
3. Amended declaration.
4. Plea thereto.
5. Demurrer of plaintiff.
6. Demurrer overruled.
7. Replication.
7½. Rejoinder.
8. Entry to use of Mertens & Agnew.
9. Ditto.
10. Additional pleas.
11. Demurrer to 2d and 3d pleas.
12. Order on demurrer.
13. Additional pleas.
14. Demurrer to 5th and 6th pleas.
15. Order on demurrer.
16. Replication to pleas of set off, Nos. 2, 5, 6, 7, and 9, joinder on Nos. 8 and 10.
17. Leave to file further rejoinder.
18. Demurrer to further rejoinder.
19. Order on demurrer.
20. Verdict.

61 21. Motion in arrest.
22. Order overruling motion in arrest.

23. Judgment.
24. Appeal in open Court.
25. Penalty of bond fixed.
26. Memoranda of the extension of the term and the various extensions of time to settle bill of exceptions and to file transcript.
27. Bill of exceptions.

JNO. RIDOUT,
Attorney for Defendants.

62 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 61, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44,822 at law, wherein Melville D. Hensey, is Plaintiff and The Mercantile Trust Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

Seal Supreme Court of the District of Columbia

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the city of Washington, in said District, this 28″ day of November, A. D., 1905.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1629. The Mercantile Trust Company, a Corporation, Appellant, *vs.* Melville D. Hensey. Court of Appeals, District of Columbia. Filed Nov. 28, 1905. Henry W. Hodges, Clerk.

WEDNESDAY, *February* 21*st*, *A. D.* 1906.

No. 1629.

THE MERCANTILE TRUST COMPANY, a Corporation, Appellant,
vs.
MELVILLE D. HENSEY.

The argument in the above entitled cause was commenced by Mr. Hayden Johnson, attorney for the appellant, and was continued by Messrs. H. F. Woodard and A. A. Birney, attorneys for the appellee, and was concluded by Mr. John Ridout, attorney for the appellant.

On motion, both sides are allowed to file supplemental briefs herein if so advised.

No. 1629.

MERCANTILE TRUST COMPANY, Appellant,
vs.
MELVILLE D. HENSEY, Appellee.

Opinion.

(Mr. Justice DUELL delivered the opinion of the Court.)

One William S. Jones, a builder, on January 24, 1900, entered into a contract with appellee, Hensey, to complete twenty-one partially constructed houses for the stated consideration of $89,250. To insure the performance of the contract, Jones gave to Hensey a bond in the penal sum of $50,000, with appellant, the Mercantile Trust Company, as surety. It further appears that five of these houses were owned by the Tulloch estate, and that Hensey was bound to complete them. He gave to Samuel W. Tulloch a bond to insure the completion of these houses. This appellant was also the surety on that bond.

On July 23, 1901, Hensey sued the Mercantile Trust Company to recover fifty thousand dollars, the amount of the $50,000 bond. The declaration contained one count, alleging that by its certain written obligation, duly sealed, the defendant acknowledged that it was bound unto the plaintiff in the sum of $50,000, no part of which had been paid. To this declaration a plea of *non est factum* was filed. Thereupon a second count was added, which recited the bond as that of William S. Jones, principal, and The Mercantile Trust Company, surety, with other necessary averments. To this count defendant pleaded performance, set-offs, payment and discharge, and the failure of plaintiff to perform his part of the contract. A demurrer was filed and sustained to the pleas alleging plaintiff's failure to perform; issue was joined on the pleas of payment and discharge; replication non assumpsit was filed to the pleas of setoffs and issue joined; and replication to the plea of performance, denying the same and assigning breach, upon which issue was joined.

Later, leave being granted, a rejoinder was filed to plaintiff's replication assigning breach, and to this rejoinder plaintiff demurred and his demurrer was sustained. Trial being had upon the issues of performance, set-offs, and payment and discharge, the case went to the jury, which found a verdict for plaintiff in the sum of $8,468, for which amount judgment was given May 19, 1905, after a motion to arrest the judgment on the verdict had been denied. From that judgment this appeal was taken.

The appellant assigns as reversible error the following:

"1. In sustaining the demurrer to the defendant's further rejoinder.

"2. In admitting evidence tending to prove that the buildings were not completed in accordance with the plans and specifications.

"3. In admitting the testimony of the witness Hough that the work had not been done in accordance with the plans and specifications and the cost of remedying the alleged defects.

"4. In admitting the testimony of the plaintiff that the work and material used in the houses was in many respects, in his estimation, below the requirements of the plans and specifications.

"5. In granting the plaintiff's second prayer, which reads as follows:

" 'If the jury find from the evidence that the buildings in question were not constructed in accordance with the contract, plans, and specifications therefor, then they are instructed that the plaintiff is entitled to recover such damages as he may have proved resulted therefrom, and the measure of his recovery on this ground is the difference between what the houses were worth when completed and what they would have been worth had they been completed as required by the contract.'

"6. In refusing to grant defendant's first prayer, which reads as follows:

" 'The jury is instructed that upon all the evidence in this action that the plaintiff is not entitled to recover any damages against the defendant by reason of any structural defects claimed to exist in the erection of the houses referred to in this action, and in respect of this claim their verdict should be for the defendant.'

"7. In refusing to grant the defendant's second prayer, which reads as follows:

" 'The jury are instructed that the certificate of William J. Palmer accepting the houses made the subject of this litigation is conclusive of their completion according to the terms of the contract, and they are therefore not to consider any structural defects claimed to exist therein, and in this respect their verdict should be in favor of defendant.'

"8. In refusing to grant defendant's twelfth prayer, which reads as follows:

" 'The jury are instructed that in considering the question of structural defects they are not at liberty to consider anything but omissions, if any they find, and are not entitled to consider substitutions of materials or modifications of construction made with the

approval of the architect under his interpretation of the plans and specifications.'

"9. In admitting evidence tending to prove delay in completing the house referred to in the Jones contract.

"10. In granting the plaintiff's first prayer, which reads as follows:

" 'If the jury find from the evidence that the houses in question in this cause were not completed until after August 24, 1900, then they are instructed that for every day after such time that the work remained unfinished, the plaintiff is entitled to recover $50, and they should so find.'

"11. In refusing to grant defendant's third prayer, which reads as follows:

" 'The jury are instructed upon all the evidence in this action that the plaintiff is not entitled to recover against the defendant for any damages claimed to have been incurred by reason of delay in construction of the houses referred to in this suit, and in respect of this claim the verdict should be in favor of the defendant.'

"12. In admitting evidence tending to prove that the difference in value of the said houses by reason of defective construction was from $2,000 to $3,000 per house.

"13. In refusing to grant defendant's eleventh prayer, which reads as follows:

"The jury are instructed that there is no evidence in this case legally sufficient to justify them, in any event, in finding a verdict in favor of the plaintiff, on account of alleged structural defects, for more than nominal damages."

"14. In sustaining the demurrer to the additional pleas numbered 3 and 4" which alleges plaintiff's failure to perform his part of the contract.

"15. In overruling defendant's motion in arrest of judgment."

Appellant's contentions on which he relies embody the assignments of error grouped together. These will be considered in the *order in which they are set forth.*

1. That as there was no evidence of fraud or bad faith on the part of the architect, his certificate of completion, given as provided by the building agreement, is final and conclusive. There can be no question but that it is competent for the parties to a contract to agree that the certificate of an architect or other person shall be final and conclusive, and that in the absence of fraud or bad faith, which latter may arise and be shown in various ways, his certificate is final and conclusive. Crane Elevator Co. *v.* Clark, 80 F. R., 705; Sweeney *v.* U. S., 109 U. S., 618; Chicago, etc., R. R. Co. *v.* Price, 138 U. S., 188.

It is equally true, however, that such an agreement should be set out in clear and express language and cannot be implied. Central Trust Co. *v.* Louisville, etc., Rv. Co., 70 F. R., 282, and cases there reviewed. The reasons for this are obvious. Where differences arise between parties it is their right to settle such differences between themselves, or to appeal to the courts, and these rights should not be taken from them, and lodged in a third party without an

express agreement. The law applicable to the general subject is well settled, and the only difficulty lies in applying the law to the facts. It becomes necessary in every case to examine the agreement. The provisions of the contract in the case at bar require that the houses shall be completed "agreeably to the drawings and specifications made by Melville D. Hensey, architect, and which plans and specifications are signed by the said parties hereto and hereunto annexed, within the time aforesaid in a good, workman-like and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, and also shall and will find and provide such good, proper and sufficient material of all kind whatsoever, as shall be proper and sufficient." And there is a further agreement that "The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings to the true meaning and intention of the said drawings and specifications, without any extra charge whatever." Payments as the work progressed were agreed to be made, provided that "a certificate shall be obtained from and signed by the architect in charge, that the contractor is entitled to payment; said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications either in execution or materials, and further that the party of the second part shall furnish, if required, satisfactory evidence that no lien does or can exist upon the work." The specifications, made a part of the contract, provide, among other things, "For material to be furnished and labor to be performed in the erection and completion of twenty-one (21) residences * * * for Mr. Melville D. Hensey; to be built according to the plans and elevations and detail drawings, and these specifications prepared by M. D. Hensey, architect, but under the supervision of an architect to be appointed by Bates Warren, said architect appointed to take entire charge."

In the general conditions these recitals appear: "The contractor will provide all the materials, new and of the best quality, and will execute and complete all the work as set forth in the specifications and drawings in the best and most workmanlike manner * * * In all cases of doubt as to the meaning of the drawings reference is to be made to the architect in charge whose decision will be final. The drawings and specifications are intended to co-operate, and anything shown upon one or stated in the other is to be done and performed as if set forth in both."

Bates Warren, named in the contract, on April 19, 1901, appointed one Palmer, an architect, to take entire charge. He accepted the appointment and on July 29, 1901, he gave Mr. Warren the following certificate:

JULY 29, 1901.

Bates Warren, Esq., Washington, D. C.

DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses, located on Vernon, California, Kalorama, and Belmont avenues, by the Mercantile Trust Company, of Pittsburg. The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications, it has been where the same has been inconsistent and ambiguous; and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses.

Yours very truly, W. J. PALMER."

It appears by the record that Palmer was called as a witness for plaintiff and on cross-examination testified in substance that "a large part of the work upon the houses in question was completed when he commenced his supervision; that he did not regard it as his duty to change conditions there excepting where the brickwork had been destroyed by vandalism, and tore nothing down unless it was in danger of falling down. Had nothing to do with the work which was already done, and was only to supervise the completion of the work. The witness testified further that on June 17, 1901, he wrote to Mr. S. W. Tulloch a letter which was produced in evidence, which letter reviewed a large number of alleged defects in the work on the houses, recognized some as existing and stated they would be remedied, and declared that other objections were not well taken, and contained a further statement as follows: 'You will appreciate, I have no doubt, the difficulty of my position having but recently been appointed (April 19th, 1901) as architect in charge, my position really becomes rather referential than administrative and supervisory,' and said witness explained that by the said statement he thought he meant that most of the work had been done, and it was difficult for him to rectify work that was already done badly."

After an examination of so much of the contract and specifications as are set out in the record, we are forced to the conclusion that its terms are not sufficiently clear and express to warrant us in holding that the architect's letter, reporting the completion of the houses, must be taken as final and conclusive and sufficient to preclude the appellee from giving testimony showing that the contract had not been complied with. True, the contract says that the work is to be done "to the satisfaction and under the direction of Bates Warren or the architect placed in charge by him." It does not say that his decision that the work has been done to his satisfaction is to be final and conclusive. Nowhere do we find any stipulation that the architect's decision on any point is to be final save "as to the meaning of the drawings." Further, when payments were called for they were only to be made upon the certificate of the architect, but such certificate was in no way to lessen the final responsibility of the contractor, and obliged him to remedy defects either in execution of the work or in materials. This we think tends to show that it was not the intention of the parties, especially Hensey's, to make

the architect's certificate final and conclusive. We do not think that under the authorities fraud or bad faith on the part of Palmer must be shown in order to go behind his letter reporting the completion of the houses. Even his letter says that deviations from the plans and specifications have been made, and he adds that where that has occurred the work has been done to the advantage of the houses. Called as a witness, as we have shown, on cross-examination, he testified that in a letter to S. W. Tulloch he had written that his position had been referential rather than administrative and supervisory. The facts, as we view them, bring the case within the line of authorities holding that the certificate of an architect, in the absence of express language, is not final and conclusive to the extent of precluding the owner from showing that the materials were inferior or the work poorly done or to show other violations of the contract. Glacius *v.* Black, 50 N. Y., 145; Fontano *v.* Robbins, 22 App. D. C., 253, and cases there cited. We think the facts of this case do not bring it within appellant's contention that the architect's certificate of completion is final, and therefore all the errors assigned relating to the subject are not well founded and no error was committed by the trial court in his rulings on this question.

2. It is next urged that even if the houses were not completed in the manner required, there is no proof in the case that damages were sustained by appellee by reason thereof. To sustain this proposition it is argued that as the houses were sold under foreclosure immediately after completion appellee, besides showing diminished value owing to the way houses were constructed, should have proved that he thereby sustained some tangible loss. We think the court was right in stating the measure of damages in the case to be "the difference between what the houses were worth when completed, and what they would have been worth had they been completed as required by the contract." The question was left to the jury to determine whether the houses were constructed in accordance with the contract plans and specifications. There was evidence on the subject sufficient to make the question one for the jury. If the appellant sold the houses immediately after their completion, as the record shows, the appellee thereby was given no opportunity to rent or sell the houses, or otherwise utilize them. It would be a harsh rule, and one so far as we know never applied, that a contractor can improperly erect a building by departing from the contract plans possess himself of a mortgage or trust notes on the property, sell the building at auction, bid it in, and thereby be in a position to say to the owner: Yes, I failed to comply with the terms of the contract so that the building when completed was not worth as much as it would have been had I properly carried out the contract, but though you were damaged, you cannot recover anything, for I have foreclosed a lien upon it and your title is extinguished. No one can profit in this way by his own wrong. The proposition is untenable and the cases cited by appellant do not support it.

3. Appellant further contends that the surety assumed no liability for damages for delay, but that, should it be held otherwise, he is not bound by any stipulation as to liquidated damages, and,

there being no proof of any actual damages, *no liability is im-*posed upon him. With his assertion that a surety's liability cannot be extended by implication we agree. The appellant's liability for damages owing to a delay in completing the work, and that such damages are liquidated damages, must be found, if at all, in his written obligation, taken in connection with the contract. The obligation of the appellant under his bond to respond for the delay in completing the houses is claimed to be found in the following clause of the bond: "That if the said principal shall duly and faithfully perform and fulfill *all and every the conditions of said contract*, above recited, on his part to be kept and performed, and shall keep harmless and protect the said obligee from and against all loss by reason of the *non-fulfillment* by the said principal of *the covenants contained in said contract*, to be performed by him as aforesaid, and also against actual loss by reason of any and all claims, defects, errors, objections, liens and encumbrances, arising from the non-fulfillment by the said principal of the said covenants, then this obligation to be void; otherwise to be and remain in full force and effect." In short, the appellant agrees to protect the appellee from all loss arising from the non-fulfillment by its principal of the covenants in the contract contained. Turning to the contract we find that it provides that "Should the contractor fail to finish the work at, or before, the time agreed upon, he shall pay to the party of the first part the sum of fifty dollars for each and every day thereafter the said work shall remain unfinished as and for liquidated damages," etc. If the principal be holden to make the payment for delay, and the damages are liquidated, we see no reason why the surety is not also liable. It is bound to do all that its principal was holden to do. That the principal was bound to pay the amount fixed as liquidated damages without any proof of actual loss is settled by the decision in the case of Sun Printing Co. *v.* Moore, 183 U. S., 642.

4. It is also contended that the performance of the agreements of the appellee were conditions precedent to that liability of the appellant, and that the appellee failed to perform in two respects. The bond is issued upon the express condition "that all the covenants and agreements contained in said contract made by the said obligee and on his part to be kept and performed, for the protection of the obligee and the said security shall be strictly kept and performed by the said obligee." It is insisted that the failure of the appellee to furnish 82 mantles and to pay the whole contract price were conditions and not covenants. The clause of the contract relative to the mantles is that they were to be furnished to the party of the second part (Jones) by the party of the first part (Hensey) free of charges. The mantles were not furnished. Appellant pleaded *in bar* the failure of appellee to furnish them. Demurrer was filed to this plea and sustained. At the trial the value of the mantles was proved to be $1325, and the jury, at appellant's request, was instructed to deduct such sum from any sum found by them to be due in respect of damages, if any such they found, for delay in or defects in the construction of the houses.

We can find nothing in the contract to warrant a conclusion that the agreement to furnish the mantles was a condition. It was a mere covenant, and appellant received the amount claimed as the value of the mantles. We think the court below properly sustained the demurrer to the plea *in bar*. Appellant also pleaded *in bar* appellee's failure to pay the total sum agreed by him to be paid for completing the houses. Appellee demurred to this plea and it was sustained. There was no error in this, for the agreement to pay was also a covenant and not a condition. The amount due was $8,630, and at the request of appellant's counsel the court instructed the jury to credit that amount upon any damages, if any such they found, for delay or defects in the construction of the houses. It may be here said that other set-offs were allowed appellant, in the light of which the amount of the damages found for appellee may seem somewhat large. The case, however, was properly left to the jury, and there is no authority vested in us to disturb their verdict, even though that question of the verdict being excessive was before us.

One other question remains for consideration. It is that the motion in arrest of judgment should have been granted because there were two inconsistent counts and no evidence was offered in support of the first count. We have heretofore stated the nature of the counts and it is unnecessary to set them out. The questions raised by the motion have been settled by this court. The first, in Chander & Taylor Co. *v.* Norwood, 14 D. C. App., 357-366; the second, by Hartman *v.* Ruby, 16 App. D. C., 45, 60. In the latter case we said

"There is neither law nor practice in this District which requires that when two or more counts are combined in one declaration the verdict of the jury must be separate upon each count. A separate verdict upon each count may be directed by the court in such cases, if the circumstances require or justify it; but, unless the jury are so directed it is not ground for arresting the judgment that the jury has conformed to the uniform practice, and has rendered one entire verdict upon the declaration as a whole.'

We think no reversible error has been shown, and therefore the judgment appealed from should be affirmed, with costs. And it is so ordered.

Affirmed.

WEDNESDAY, *March 7th, A. D.* 1906.

No. 1629. January Term, 1906.

THE MERCANTILE TRUST COMPANY, a Corporation, Appellant,

vs.

MELVILLE D. HENSEY.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was

argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the Judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE DUELL.

March 7, 1906.

THURSDAY, *March 15th, A. D.* 1906.

No. 1629.

THE MERCANTILE TRUST COMPANY, a Corporation, Appellant,
vs.
MELVILLE D. HENSEY.

On motion of Mr. Hayden Johnson, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of twelve thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The Mercantile Trust Company, a corporation, Appellant and Melville D. Hensey, appellee a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of March, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, That we, The Mercantile Trust Company (of Pittsburg Pa.) as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Melville D. Hensey in the full and just sum of Twelve thousand ($12000) dollars to be paid to the said Melville D. Hensey, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of March, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Melville D. Hensey as plaintiff and The Mercantile Trust Company a judgment was rendered against the said The Mercantile Trust Co. and the said The Mercantile Trust Co. having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Melville D. Hensey citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above stipulation is such, That if the said The Mercantile Trust Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE MERCANTILE TRUST COMPANY, [SEAL.]
By WM. H. FREDERICKS, [SEAL.]
Vice President.

Attest: WM. HAGEMAN, *Ass't Secretary.* [SEAL.]

[Seal of the Fidelity & Deposit Co., Maryland.]

FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By CHAS. R. MILLER, *Vice Pres't.* [SEAL.]
Attest: THOS. L. BERRY, *Ass't Sec'y.*

[Seal of The Mercantile Trust Co., Pittsburg, Pa.]

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

STATE OF MARYLAND, *City of Baltimore, ss:*

On this 26th day of March, A. D. 1906, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came Chas. R. Miller Vice President, and Thos. L. Berry, Asst. Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

FRED S. AXTELL,
Notary Public.

[NOTARIAL SEAL.]

Commission expires May, 1906.

[Endorsed:] No. 1629. The Mercantile Trust Company, a Corporation, Appellant, *vs.* Melville D. Hensey. Supersedeas Bond on Writ of Error. Court of Appeals. District of Columbia. Filed Mar. 27, 1906. Henry W. Hodges, clerk.

UNITED STATES OF AMERICA, *ss:*

To Melville D. Hensey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The Mercantile Trust Company, a Corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 27th day of March, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 28" Mch. 1906.
A. A. BIRNEY,
Att'y for Melville D. Hensey.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 8, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 56 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Mercantile Trust Company, a Corporation, Appellant, *vs.* Melville D. Hensey, No. 1629, January Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 29th day of March, A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Endorsed on cover: File No. 20,170. District of Columbia Court of Appeals. Term No. 245. The Mercantile Trust Company, plaintiff in error, *vs.* Melville D. Hensey. Filed April 2d, 1906. File No. 20,170.

FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 5 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 245

THE MERCANTILE TRUST COMPANY,
PLAINTIFF IN ERROR,

vs.

MELVILLE D. HENSEY.

Brief on Behalf of Plaintiff in Error

HAYDEN JOHNSON,
JOHN RIDOUT,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 245.

THE MERCANTILE TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

MELVILLE D. HENSEY.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Case.

This case comes to this court upon a writ of error to the Court of Appeals of the District of Columbia. The action, which was originally instituted in the Supreme Court of the District of Columbia, is one of covenant on a bond for $50,000, and was brought by Melville D. Hensey against the Mercantile Trust Company. The declaration contains two counts. To the first count the plea is *non est factum;* to the second count, performance,

set off, and accord and satisfaction. The facts out of which the action arose are as follows: On January 24, 1900, Melville D. Hensey was the owner of fifteen partially constructed houses on Washington Heights, in the District of Columbia. The Tullock estate was the owner of six other houses of the same character, also partially constructed, and located in the same subdivision. By previous contractual relations between Seymour W. Tulloch, acting for the Tulloch estate, and Hensey, the latter was obliged to complete the five Tulloch houses. On January 24, 1900, Hensey entered into a contract with William S. Jones, a builder, for the completion of the entire twenty-one houses for a stated consideration of $89,250 (Rec., p. 27). To insure the performance by Jones of this contract, he gave to Hensey a bond in the penalty of $50,000, and at the same time Hensey gave a bond to Seymour W. Tulloch to insure the completion of the five Tulloch houses. Upon both these bonds the plaintiff in error, the Mercantile Trust Company, became surety. The building contract between Hensey and Jones required that the twenty-one buildings be completed—

> "agreeably to the drawings and specifications made by Melville D. Hensey, architect, and which plans and specifications are signed by the said parties hereto and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, *to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him*" (Rec., p. 29).

The specifications, which are made a part of the building contract, commence:

> "Specifications for material to be furnished and labor to be performed in the erection and completion of twenty-one residences * * * for Mr. Melville D. Hensey; to be built according to plans and elevations, and detailed drawings, and these specifications prepared by M. D. Hensey, architect, *but under the supervision of an architect to be appointed by Bates Warren, said architect appointed to take entire charge*" (Rec., p. 29).

Specifications further recite:

> "In all cases of doubt as to the meaning of the drawings, reference is to be made *to the architect in charge, whose decision will be final*" (Rec., p. 29).

On the same day, January 24, 1900, Hensey conveyed fifteen houses, the title of which had been taken by him, to Mr. Bates Warren, as his trustee, to be held by the said Bates Warren upon certain uses and trusts for the benefit of Hensey's creditors.

Jones entered upon the performance of his contract, but on account of financial difficulties was unable to continue the work and finally abandoned it. The Trust Company as bondsman, thereupon, in recognition of its obligation upon the bond, took up the work and completed the houses. Prior to April 19, 1901, Warren had not exercised his right to appoint an architect to take charge of the construction, but exercised a general supervision of the work himself. On April 19, 1901, he addressed the following letter to William J. Palmer, a local architect:

"DEAR SIR: I am required by the specifications for the houses being erected on Washington Heights by the Mercantile Trust Company for Messrs. Tulloch *et. al.*, to designate and appoint an architect to be in charge of the construction of said houses. And pursuant to such requirement I hereby designate and appoint you as such architect and request that you forthwith, if agreeable to you, take charge of same. Before doing so, however, you must make some arrangement as to your compensation therefor, as I will in no way be responsible for such charges as you may make for superintending the construction of the houses, and this letter is written only for the purpose of indicating my choice of the architect to be in charge. If you conclude to accept this appointment please advise me of the same at your earliest convenience. I would suggest that you call upon the representative of the Mercantile Trust Company, Mr. Percy H. Russell, to make arrangements for your compensation above referred to.

Very truly,

BATES WARREN."

Palmer immediately assumed control and on July 29, 1901, gave the following certificate to Warren:

"BATES WARREN, Esq., Washington, D. C.

"DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses on Vernon, California, Kalorama, and Belmont avenues by the Mercantile Trust Company of Pittsburg. *The work has been done according to my interpretations of the plans and specifications*, and where deviations have been made from the plans and specifications it has been where the same were

inconsistent and ambiguous. In all cases of inconsistency and ambiguity, the work has been done according to the interpretation most beneficial to the houses.

"Very truly yours,

"WILLIAM J. PALMER."

Hensey, through lack of funds, neglected to pay the Mercantile Trust Company the balance due on the Jones contract, and when the houses were finally completed, July 29, 1901, there was a conceded balance due from Hensey to the Trust Company of $29,032, which in the trial court was allowed by the court and set off against his demand. When the houses were completed, the fifteen owned by Hensey, the title to which, however, was held by Bates Warren, his trustee, were sold out under deeds of trust on account of Hensey's inability to meet the interest on the notes (Rec., p. 30). The Mercantile Trust Company, notwithstanding Hensey's refusal to pay to it the balance due on the Jones contract, at an expense to itself of over $40,000, completed the houses in the manner indicated by the architect's certificate just recited. After the completion of the houses by the Trust Company and their sale at auction through Hensey's default, Hensey, with a conceded balance of $29,032 still due to the Trust Company on account of the Jones contract and interest paid for him by the Trust Company on account of the deeds of trust upon the said property, brought suit against the Trust Company for $50,000 on its bond; this action was founded upon a theory of Hensey's that the work was

not in every respect as required by the plans and specifications, and further that he was entitled to $50 a day as penalty for every day's delay beyond the time limited by the contract for the completion of the houses. This penalty, as he estimated it, amounted to something over $16,000.

At the trial of the case in the Supreme Court of the District of Columbia, the plaintiff offered several witnesses who testified that by reason of *omissions*, *structural defects* and *defective materials* used in the construction, the houses were worth from $2,000 to $3,000 apiece less than what they would have been worth had the requirements of the specifications, as he interpreted them, been complied with. This testimony was objected to by the defendant on the ground, among others, that the only recovery on the part of the plaintiff could be for *omissions*, and not for *structural defects* and *defective materials* used, the latter two items being controlled by the architect's decision in the matter. No separate estimate was given by any witness as to the decrease in value of the houses as the result of omissions alone or of structural defects or defective materials alone. The trial court, although it ruled that only *omissions* could be recovered for, nevertheless permitted testimony of the entire damage caused the plaintiff by reason of all of the alleged defects.

Other defenses interposed by the Trust Company at the trial were performance and set off. There was no evidence offered by the plaintiff in support of the issue presented by the first count of the declaration. There was a general verdict for the plaintiff for $8,468. The

judgment upon that verdict was affirmed by the Court of Appeals of the District of Columbia, and the case is now here for review upon writ of error to that court.

Assignments of Error.

The plaintiff in error assigns, as reversible error, the following:

I. That the trial court erred in refusing to grant the first instruction submitted by the defendant below, which is as follows:

> "The jury are instructed that upon all the evidence in this action, the plaintiff is not entitled to recover any damages against the defendant by reason of any structural defects claimed to exist in reference to the houses referred to in this action. and in respect of this claim their verdict should be for the defendant" (Rec., p. 33).

II. That the trial court erred in admitting the testimony of the plaintiff below to the effect that the difference in value of the said houses by reason of *omissions*, *structural defects* and *defective materials* was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract, plans and specifications as interpreted by the plaintiff (Rec., p. 29).

III. That the trial court erred in admitting the testimony of the witness George C. Hough respecting the total cost of taking out the alleged defective work in the said houses and making them conform to his interpretation of the plans and specifications (Rec., p. 30).

IV. That the trial court erred in sustaining the plaintiff's demurrer to the defendant's further rejoinder (Rec., p. 22).

V. That the trial court erred in refusing to grant the defendant's second prayer, which is as follows:

> "The jury are instructed that the certificate of William J. Palmer accepting the houses, made the subject of this litigation, is conclusive of their completion according to the terms of the contract, and they are, therefore, not to consider any structural defects claimed to exist therein, and in this respect their verdict should be in favor of the defendant" (Rec., p. 33).

ARGUMENT.

From the statement of the case and the assignments of error, it will be observed that the two contentions presented on behalf of the plaintiff in error are:

First, that the testimony of all the plaintiff's witnesses who testified in respect of deficiencies in construction being as to the total damage sustained by the plaintiff as the result of *structural defects*, *defective materials* and *omissions*, and the trial court having ruled that the jury should consider *omissions* alone, there was no basis upon which the jury could segregate damages caused by *defective materials* and damages caused by *omissions* so as to reach a verdict in accordance with the court's rulings.

Second, that under the building agreement, the architect's certificate of completion should have been held to

be final and conclusive of such completion, there being no evidence of fraud or bad faith on his part. These propositions will be considered in order.

I. No basis furnished by the testimony upon which the jury, under the instructions given them by the court could have estimated damages.

It is submitted that it is apparent, upon an inspection of the record, that upon all the testimony in the case, and the rulings of the trial court in respect of the law applicable to such testimony, there was left to the jury absolutely no basis upon which to estimate the damage sustained by the plaintiff, if any, growing out of the defects assigned by him in his specification of breaches.

All the witnesses who were produced by the plaintiff testified, in proof of the damage sustained by the plaintiff, that the difference in the value of the houses by reason of the *omissions*, *structural defects* and *defective materials* was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the witness's interpretation of the contract, plans, and specifications. (Rec., p. 29). No witness was interrogated in respect of the difference in the value of the houses by reason of omissions alone. No witness undertook to segregate the items assigned as breaches, and give the damage arising from each alleged defect. All the witnesses testified simply as to the total diminution in value as the result of the three items, viz., *omissions*, *structural defects* and *defective materials*.

Now the trial court granted the 12th prayer of the defendant, which is as follows:

> "The jury are instructed that in considering the question of structural defects, *they are not at liberty to consider anything but omissions*, if any they find, and *are not* entitled to consider *substitutions of materials* or *modifications of construction* made with the approval of the architect under his interpretation of the plans and specifications." (Rec., p. 35).

It will further be observed that the architect, William J. Palmer, on July 29th, 1901, addressed the following certificate to Bates Warren, Esq., the trustee of Mr. Hensey:

> "DEAR SIR:—It gives me pleasure to report to you the completion of the twenty-one Kellogg houses on Vernon, California, Kalorama and Belmont avenues, by the Mercantile Trust Company of Pittsburg. *The work has been done according to my interpretation of the plans and specifications*, and where deviations have been made from the plans and specification, it has been where the same were inconsistent and ambiguous, and, in cases of inconsistency and ambiguity, the work has been done according to the interpretation most beneficial to the houses."

In commenting upon the twelfth prayer above recited the trial court, after reading the prayer, said (Rec., p. 35):

> "That is to say, gentlemen, putting it in another way, that under this contract an architect was chosen, and the contract provided that wherever

there is any doubtful construction to be given as between the drawings and specifications, if there happens to be any antagonism between the two, and if it cannot be readily seen what it means, then the architect was to decide finally upon the question, and his decision was final in the premises, unless you find that he acted in bad faith or was so negligent in his duty as to amount to bad faith in the premises. Wherever there was any doubtful question arising about the drawings and specifications then the architect's duty was to decide, and his decision was final and binding on all the parties to this cause."

From the foregoing it must be readily seen that under the rulings of the court the case was submitted to the jury for them to assess damages only for omissions, if any they should find, and that they were expressly instructed not to assess damages for *substitutions of material* or *modification of construction* made with the approval of the architect under his interpretation of the plans and specifications. This necessarily requires, in view of the testimony of the architect, that what "*substitutions of material* and *modifications of construction* were made were made with his approval and according to his interpretation of the plans and specifications, that the jury segregate the damage arising from *omissions* from the damages resulting from *substitutions of material* and *modifications of construction*. Unless from the testimony they can do this, the charge given them in the twelfth prayer, and its explanation by the court, becomes idle and useless. And yet all the testimony in the case, as far as the money

estimate for damage is concerned, lumps *omission*, *structural defects* and *defective materials*, and furnishes no basis whatever upon which they can be segregated. Even though *all* of the substitution of materials and modifications of construction were not made with the consent of the architect, it is conceded that some of them were, so this segregation is none the less essential in giving the jury a basis upon which to assess damages. All the evidence in the case upon this point, as shown by the bill of exceptions, is that recited at pp. 29–30 of the Record, and is as follows:

> "The plaintiff further gave evidence by several other witnesses, over the objection and exception of the defendant duly reserved, tending to prove that the said buildings were not completed until after August 24, 1901, and that the same were not completed according to said plans and specifications in the particulars set forth in the assignments of breaches; and that the difference in value of the said houses by reason of *omissions*, *structural defects* and *defective materials* was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract, plans and specifications.
>
> "Thereupon the counsel for plaintiff called as a witness Mr. George C. Hough and among other things the witness was asked with great detail as to items, *whether the work provided for by the drawings and specifications had been done in accordance therewith*, to which question counsel for the defendant objected on the ground that the architect was exclusively clothed with authority to decide such questions, but the court overruled the objection and

allowed the witness to answer, to which ruling counsel for defendant excepted.

"Thereupon the witness testified in much detail that the work in many respects failed to meet these requirements.

"He was then asked and over objection and exception duly reserved, allowed to answer as follows:

"What would it have been fairly worth to take out *the defective work*, so far as it was possible to do so without taking the houses down, and make the houses conform to that extent to the plans and specifications.

"Answer: '*$2,000 for each house.*'

"Thereupon the plaintiff over defendant's objection and exception duly reserved, in his own behalf, gave testimony tending to prove that in the erection of the said houses there were omissions of work and materials required by the plans and specifications, *and that inferior materials were substituted for specified materials, and that the workmanship was in many respects below the requirements of said contract and specifications;* and further that the houses were not completed until after August 24, 1901, and that for these reasons the full amount of $89,250 was not paid to said Jones or the defendant, and that $8,630, and notes aggregating $21,000, parts of the contract price, were not paid by him, and that the mantels mentioned in the contract were never supplied by him."

The propriety of the trial court in granting the twelfth prayer of the defendant, which instructed the jury which items in the assignment of breaches to consider and which not to consider, is certainly immaterial to the issues here presented. That prayer was granted and the

jury were required to take it into account in connection with the rest of the charge and the testimony taken before them. It seems perfectly clear that this testimony was not sufficiently complete to enable them to follow that instruction of the court.

II. The Architect's Certificate Conclusive.

1. It must be remembered that Bates Warren held the title to the houses in question as trustee for Hensey and Hensey's creditors (Rec., p. 30). He was in privity only with Hensey and the Hensey interests, and stood in no relation whatever with Jones or Jones' bondsman. Hensey demanded by his contract with Jones that Jones perform his work "*to the satisfaction and under the direction of Bates Warren or the architect placed in charge by him*" (Rec. p. 27). Neither Jones nor the Trust Company had any voice in the selection of this representative or in the selection of the architect. It was their duty to do the work, subject to the limitations of the plans and specifications, to his satisfaction, whoever he was. The question then is, did they do it? Bates Warren, Hensey's trustee, was in charge of the work from the date of the contract, January 24, 1900, until he saw fit to appoint an architect, which was April 19, 1901. William J. Palmer, the architect appointed by Warren, was in charge of the work from April 19, 1901, until the work was finished. There was no suggestion at the trial, nor is there in the record, that Warren ever found fault with a single detail of the work while he was in charge. In appointing Palmer the architect, as the work was near-

ing completion, he no doubt appointed the man he and his *cestui que trust* (Hensey) thought would best protect the Hensey interests. There is not the slightest suggestion, nor a single fact, from which an inference could be drawn that either Warren or Palmer, during the periods of their respective supervision, acted otherwise than in the best of good faith, and with a sincere desire to protect and promote the interests of their principal, Palmer, when the work was finished, voluntarily sent Warren the following letter:

"*January 29, 1901.*

BATES WARREN, Esq.,
Washington, D. C.

DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses on Vernon, California, Kalorama, and Belmont avenues, by the Mercantile Trust Company, of Pittsburg. The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications, it has been where the same were inconsistent and ambiguous, and in all cases of inconsistency or ambiguity, the work has been done according to the interpretation most beneficial to the houses.

Yours very truly,

WILLIAM J. PALMER."

If Warren's business engagements were such as to prevent his frequent visits to the property so that to Hensey "apparently one Frank H. Knight, a foreman employed by the defendant, was in charge until the appointment of Mr. W. J. Palmer, an architect, in April,

1901," it certainly cannot militate against the defendant. The Trust Company had neither the means of compelling the constant attendance of Warren upon the work nor compelling the exercise of his privilege of appointing an architect. The company had to have a foreman, and it is not strange that he appeared to be in charge of the work. The fact that Hensey wrote captious letters in the nature of self-serving declarations to the company during the progress of the work should, it is submitted, be the subject of no consideration. Every one realizes that it is utterly impossible to perform any branch of work in any department to the satisfaction of every one. Jones did not contract to do the work under Hensey's directions, but under the direction and to the satisfaction of his trustee, Bates Warren, or an architect to be selected by Bates Warren, and Jones' bondsman at an enormous expense to itself, completed the work to the satisfaction of both.

Stress seems to be laid upon the cross-examination of Palmer, in which he gives his estimate of the duties his appointment imposed upon him. He says that he "had nothing to do with the work which was already done, and was only to supervise the completion of the work. Apart from the question how his misconception could prejudice the rights of the Trust Company, which was working in good faith under his supervision, it is submitted that the record shows that there was no misconception. By the terms of the building contract under which the buildings were being constructed, Warren was the sole supervisor and referee up to the

time of the appointment of Palmer. It is not pretended that there could be any other construction of the contract. It would be preposterous to contend that the Trust Company, after almost entirely completing the buildings under the supervision of Warren, could be compelled by Palmer upon his appointment to replace or alter the work Warren had sanctioned. But a discussion of this subject is needless, because Palmer in his certificate (Rec., p. 31) attests to the entire completion of the houses according to the plans and specifications.

Taking into consideration that there is not one word in the record from which fraud or bad faith on the part of either Warren or Palmer could be inferred, it is believed that they, having been made the arbitrators by Hensey as to the proper construction of the work, and the Trust Company having acted under their directions, their decision is final and binding upon Hensey.

The law upon the subject is entirely settled.

In Boettler vs. Fendick, 73 Texas, 494 (5 L. R. A., 270), which was a case involving a building contract nearly resembling the one at bar, it was said:

> "In an action under such a contract for the improper construction of the building, evidence by witnesses that the work was not done in a workmanlike manner is inadmissible where there is no evidence of fraud or collusion on the part of the architect and he has given the certificate required by the contract as to the character of the work."

There is also in the L. R. A. report of this case a note citing numerous authorities in support of it.

Crane Elevator Co. *vs.* Clark, 80 Fed. Rep., 705:

"When a contractor has undertaken to do certain work to the satisfaction of an architect, the determination of the architect, so constituted an umpire, is final and conclusive and can be impeached *only for fraud, collusion, or such gross mistake as implies bad faith.*"

Sheffield, etc., Railway Co. *vs.* Gordon, 151 U. S., 285:

"When a contract provides that work done under it shall be examined by a superintendent every two weeks, and if done to his satisfaction it shall be a final acceptance by the other party, so far as done, the acceptance by the superintendent forecloses that party from thereafter claiming that the contract had not been performed according to its terms."

Martinsburg, etc., R. R. Co. *vs.* March, 114 U. S., 548:

"A contract for the construction of a railroad provides that the companies' engineer should, in all cases, determine questions relating to its execution, including the quantity of the several kinds of work to be done and the compensation earned by the contracts at the rates specified; that his estimates should be final and conclusive; and that 'whenever the contract shall be completely performed on the part of the contractor and the said engineer shall certify the same in writing, under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which, according to their contract, shall be due.' Held, that in the absence

of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the action of the engineer in the premises was conclusive upon the parties."

Chicago, etc., R. R. Co. *vs.* Price, 138 U. S., 188:

"When a contract with a railway company for construction work provided for monthly payments to the contractor, 'on the certificate of the engineer should be conclusive on the parties as to quantities and amounts, and when, in executing the contract each monthly account as made up by the division engineer was sent to the chief engineer and the monthly payments were made on the certificate of the latter officer, his action in making such certificate was held to be a 'determination' under the contract, conclusive upon the parties in an action at law, in the absence of fraud or of such gross error as to imply bad faith."

Sweeney *vs.* U. S., 109 U. S., 618:

"When a contract with the United States for building a wall provides that payment for the work contracted for shall not be made until an agent, to be designated by the United States, certifies that it is in all respects as contracted for, and after completion of work the designated agent refuses to give the certificate, and there is no fraud, nor such gross mistake as would necessarily imply bad faith, nor failure to exercise honest judgment on the part of the agent, the engineer's certificate is a condition precedent to payment."

See, also—

Kihlbery *vs.* U. S., 97 U. S., 398.

Rose's notes to Sweeney *vs.* U. S., Vol. 10, page 372.

2. At the trial below it was urged by the appellees that a further provision of the building contract under consideration destroyed the conclusiveness of the architect's certificate. That provision is as follows (Rec., p. 28): That the owner shall pay to the contractor the sum of—

> "$89,250, to be paid to the said party of the second part (the contractor) as the work progresses and in the manner and at the time set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part of this agreement. Provided, that in each of the said cases a certificate shall be obtained from and signed by the architect in charge, that the contractor is entitled to payment; said certificate, however, in no way lessening the total and final responsibility of the contractor. Neither shall it exempt the contractor from liability to replace the work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications, either in execution or materials."

This paragraph, it is confidently submitted, can by no construction have the effect claimed for it by the appellee. The object of its insertion is entirely obvious. It first provides that the contract price shall be paid the contractor as the work advances, in instalments as set out in an annexed schedule. The next sentence, which is inserted in every building contract, is to justify the owner in paying an instalment to his contractor which the contractor claims to be due, without conclusively admitting that all the work up to that stage has been

done. For instance, the contractor makes demand for his "second floor joist" payment. It might well be that in a number of small details the work has not reached the stage contemplated by that payment, or it might be that certain work already done will have to be done over. Now, if the contractor is refused this payment until all these objections are remedied, it might, if the contractor has no capital behind him, cause a cessation of the work altogether. But with a provision similar to the one just quoted the owner can pay the contractor the instalment demanded and at the same time not waive any defects up to that time. The provision has reference to certificates for payments and nothing more. It can certainly have no application where the architect appointed by the owner or his trustee finally and conclusively accepts the work *upon its entire completion*, and certifies that it has been done "according to my interpretation of the plans and specifications" (Rec., p. 31), especially with a provision in the contract (Rec., p. 29) "that in all cases of dispute as to the meaning of the drawings, reference is to be made to the architect in charge, *whose decision will be final.*"

This construction gives effect to both provisions in the contract, and has, it is believed, never before been questioned. The judgment of Palmer at the time, which was four years after he gave his certificate, was the same as when the certificate was given. The paragraph in question would never mean that after completion with satisfaction of the architect the owner could still come forward and have his independent whims and theories of construction humored at the expense of the contractor.

The learned court below, in its opinion (Rec., p. 43) reaches the conclusion that, although the contract says that the work should be done "to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him," it is not clear that the architect's decision that the work has been done to his satisfaction is to be final and conclusive. The opinion says, that the contract "does not say that his (the architect's) decision that the work has been done to his satisfaction is to be final and conclusive." If the architect's conclusion that the work has been done to his satisfaction is not conclusive of the work having been so done, is it not pertinent to inquire whose opinion could be? Could Hensey be permitted to show that the work was not done to the satisfaction of the architect, when the architect has said that it was? Yet, this is the ruling of the court below. If the contract says the work is to be done to the satisfaction of the architect, and the architect says that it has been done to his satisfaction, could anything be more final and conclusive? Hensey might show that the work has not been done to his satisfaction ; and Hensey's witnesses might testify that the work has not been done to their satisfaction; but that was not the contract that the Trust Company undertook. They undertook to do the work to the satisfaction of Bates Warren, or the architect to be appointed by him, and the testimony is conclusive that they did it. If they had followed their own judgment upon the work, or that of Hensey and his witnesses, the result might have been different ;

but it would not have been what the Trust Company contracted it should be, which was to see that the work was performed to the satisfaction of Bates Warren or his architect.

It is respectfully submitted, for the reasons urged, that the record discloses error, for which the judgment of the court below should be reversed.

HAYDEN JOHNSON,
JOHN RIDOUT,
For Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 245.

THE MERCANTILE TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

MELVILLE D. HENSEY, DEFENDANT IN ERROR.

Brief for Defendant in Error.

ARTHUR A. BIRNEY,
HENRY F. WOODARD,
For Defendant in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 245.

THE MERCANTILE TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

MELVILLE D. HENSEY, DEFENDANT IN ERROR.

Brief for Defendant in Error.

The defendant in error, Melville D. Hensey, brought his suit at law, in the Supreme Court of the District of Columbia, against The Mercantile Trust Company, as surety for one William S. Jones, to recover $50,000. He had a verdict for $8,468, and judgment was entered thereon. Upon appeal by the trust company to the Court of Appeals, that court affirmed the judgment, and the trust company sued out a writ of error from this court.

The case as shown by the record is as follows:

Mr. Hensey and William S. Jones, on January 24, 1900, entered into an agreement, by the terms of which Jones agreed to well and sufficiently erect and replace all defective work and finish agreeably to certain drawings

and specifications, and within seven months from the date of the contract, twenty-one dwelling-houses for the consideration of $89,250, to be paid him as the work progressed, in the manner and at the times set out in the schedule of payments agreed to, which provided that the last payment ($16,014) should be made "when the houses are fully completed in accordance with said agreement and plans and specifications prepared therefor." The contract further provided that the owner, Hensey, should furnish the contractor eighty-two mantels free of charge.

It was also specially provided in substance that the work contracted for should be done agreeably to the drawings and specifications made by Melville D. Hensey, architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of the said Bates Warren, or the architect placed in charge by him.

It was also provided that to secure each instalment a certificate—

> "*shall be obtained from and signed by the architect in charge that the contractor is entitled to payment; said certificate, however, in no way lessening the total and final liability of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications, either in execution or materials*" (Rec., p. 28).

For failure to finish the work by the time agreed upon, the contractor agreed to pay $50—

> "for each and every day thereafter the said work shall remain unfinished, as and for liquidated damages" (Rec., p. 28).

The specifications contained the following paragraphs (Rec., p. 29):

> "For material to be furnished and labor to be performed in the erection of twenty-one (21) residences . . . for Mr. Melville D. Hensey, *to be built according to the plans and elevations and detail drawings and these specifications*, prepared by M. D. Hensey, architect, but under the supervision of an architect to be appointed by Bates Warren, said architect to take entire charge.
>
> . . . . . .
>
> "In all cases of *doubt as to the meaning of the drawings* reference is to be made to the architect in charge, whose decision will be final."

To secure the performance by the contractor, Jones, of the above partially recited contract, the said Jones and The Mercantile Trust Company gave their joint bond in the penalty of $50,000 with condition—

> "that if the said principal shall duly and faithfully perform and fulfil all and every the conditions of said contract above recited, on his part to be kept and performed, and shall keep harmless and protect the said obligee from and against all loss by reason of the nonfulfilment by the said principal of the covenants contained in said contract." . . .

the obligation should be void, otherwise to be and remain in full force and virtue (Rec., p. 26).

The Pleadings.

The plaintiff's declaration, as at first filed, contained one count which inaccurately described the bond, and defendant pleaded *non est factum*. The declaration was then amended by adding a second count, and upon this the plaintiff stood at the trial.

The defendant interposed ten pleas as follows: 1st,

performance; 2d, 5th, 6th, 7th, and 9th, set-off; 3d, failure of plaintiff to furnish the mantels contracted for; 4th, failure of plaintiff to pay the whole of the contract price for the buildings; 8th and 10th, payment and discharge.

A demurrer to the third and fourth pleas was sustained on the ground that the requirements that the plaintiff should furnish the mantels and should pay the contract price were not conditions precedent, and that nonperformance thereof could not bar his suit.

To the plea of performance the plaintiff replied by assigning breaches, and claimed that he had been damaged in the sum of $16,500, by reason of failure to complete the houses within the contract time—that is, seven months—and further damaged in the sum of $43,830, because of the failure of defendant's principal to complete and finish the twenty-one houses according to contract, plans, and specifications, which were all intended to cooperate.

To this replication the defendant rejoined as follows:

> "Defendant for a further rejoinder, filed by leave of the court first obtained, to plaintiff's replication (by assignment of breaches) says that by the terms of the contract referred to in the said written obligation, it is, among other things, provided in substance as follows: That the work therein contracted for should be done agreeably to the drawings and specifications made by Melville D. Hensey, architect, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of the said Bates Warren, or the architect placed in charge by him. The said Bates Warren, pursuant to the terms of said contract, appointed William J. Palmer as the architect; that said work was completed by the said William S. Jones, and the defendant acting for him, in a good, workmanlike,

and substantial manner, to the satisfaction and under the direction of the said William J. Palmer, and according to his interpretation of said plans and specifications, and that he, the said Wm. J. Palmer, has testified to such completion by writing or certificate under his hand in the following language:

'*July 29, 1901.*

BATES WARREN, Esq.,
Washington, D. C.

DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses, located on Vernon, California, Kalorama, and Belmont avenues, by The Mercantile Trust Company, of Pittsburg. The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications, it has been where the same has been inconsistent and ambiguous; and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses.

Yours very truly,

W. J. PALMER.'"

To this rejoinder the plaintiff demurred on the ground that by the terms of the contract the certificate of the architect set out in the rejoinder is not a bar to the right of the plaintiff to recover for the defects, omissions, and alterations set out in the assignment of breaches (Rec., p. 23).

The demurrer was sustained (Rec., p. 23).

Trial was had upon, (*a*) the issues of performance raised by the first plea, (*b*) set-off raised by pleas 2, 5, 6, 7, and 9, and (*c*) payment and discharge raised by pleas 8 and 10 (Rec., 19, 20).

In his replication assigning breaches of the condition plaintiff averred (1st) failure to complete the houses within the contract time of seven months, and until

July, 1901, to his damage $16,500, and (2d) failure to construct the houses according to the contract, plans and specifications, to his damage $43,830. The items of misconstruction were set out in detail.

The jury after allowing all the items of set-off, as required by the court, awarded the plaintiff $8,468.

The Evidence.

The plaintiff proved that the buildings were not completed until after August 24, 1901, or more than one year after the time fixed by the contract (Rec., p. 29), and this was not controverted.

He also proved (over the objection of the defendant that the certificate of the architect was conclusive against the claim) that the houses were not built according to the plans and specifications, and that the difference in value of the houses, by reason of the omissions, structural defects, and defective materials, was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract (Rec., p. 29).

The defendant met this proof: first, by insisting that the houses were built according to contract, and, second, by insisting that however great the departure from the contract in the manner of building, a certificate from William J. Palmer afforded the defendant immunity.

It was shown that Mr. Palmer was appointed architect April 19, 1901, (fifteen months after the date of the contract, and eight months after the time fixed for its completion); that he thereafter supervised the work on eighteen of the houses, having nothing to do with the other three (Rec., p. 31), and that on July 29, 1901, he reported the completion of the work; that it had been done according to *his interpretation* of the plans and specifications, and that deviations were made only where

the plans and specifications were inconsistent or ambiguous (Rec., pp. 31, 32).

Upon cross-examination, Mr. Palmer testified in substance—

> "that a large part of the work upon the houses in question was completed when he commenced his supervision; that he did not regard it as his duty to change conditions then, excepting where the brickwork had been destroyed by vandalism, and tore nothing down unless it was in danger of falling down. Had nothing to do with the work which was already done, and was only to supervise the completion of the work."

He admitted that on June 17, 1901, he wrote a party in interest, concerning alleged defects in the work:

> "You will appreciate the difficulty of my position. Having very recently been appointed (April 19, 1901) as architect in charge, my position really becomes rather referential than administrative and supervisory."

The witness explained that by this statement he meant that most of the work had been done, and it was difficult for him to rectify work that was already done badly. (Rec., p. 32.)

The specific imperfections and omissions shown in evidence are set out in the assignment of breaches at pages 7, 8, 9 of the record.

The court held in substance:

1. That plaintiff might recover $50 for each day the work remained unfinished after the seven months fixed by the contract.

2. That he might recover for failure to build according to the contract and that the measure of his recovery on this ground was "the difference between what the houses were worth when completed and what they would have

been worth had they been completed as required by the contract."

3. That defendant should recover the several sums claimed by its pleas of set-off.

4. That the architect's certificate was not conclusive that the houses were built according to contract.

5. That wherever there was a doubtful question between the drawings and the specifications, it was the duty of the architect to decide it, and his decision thereon was final and conclusive unless made in bad faith.

In the Court of Appeals the plaintiff in error presented five propositions for the opinion of that court, as well appears from the opinion. They were: (1) The architect's certificate of completion is conclusive that the houses were completed according to contract. (2) Assuming that the houses were not completed in accordance with the plans and specifications, there is no proof in the cause that any damages were sustained by Mr. Hensey. (3) Under the bond the surety is not liable for delays, or, if liable, is not bound by the stipulation for liquidated damages. (4) Delivery of the mantels and payment of the entire contract price are conditions precedent to the right of the owner to sue. (5) The motion in arrest of judgment should have been granted (Rec., pp. 41–46).

The Assignments of Error.

In this court the plaintiff in error reduces its contentions to two:

First. That no basis was furnished by the testimony upon which the jury, *under the instructions given by the court* could have estimated damages.

Second. That the architect's certificate was conclusive on the parties.

I.

A False Assignment.

The argument under the first assignment is based wholly upon the proposition that the trial court *granted* the twelfth of defendant's prayers for instructions, which asked that in considering the question of structural defects, the jury should consider nothing but omissions, and should not consider substitutions of material, or modifications of construction made with the approval of the architect. *The court did not grant this prayer, but rejected it* as contrary to the rulings throughout the case. On page 34 of the record appears the defendant's exception to the rejection, and on page 40 is its assignment of error in the Court of Appeals, for such rejection, in these words: "In refusing to grant defendant's twelfth prayer which reads as follows:" [Here follows the prayer.]

Some confusion is made by an obvious clerical mistake, committed by counsel for plaintiff in error in the making up of the bill of exceptions, which, after reciting that the twelfth prayer was rejected (Rec., p. 34), states (p. 35) that "the court read to the jury prayer number twelve of the defendant (granted)." The comments of the court, immediately following, show that the prayer in question was No. 13, and that this is what was read. This is also made evident by the fact that counsel on neither side suggested any contradiction in the action of the court, counsel for the defendant contenting themselves with objecting only "to so much of the charge of the court as repeated the plaintiff's prayers" (Rec., p. 35), the second of which (Rec., p. 32) like the body of the charge, was distinctly opposed to the theory of defendant's twelfth prayer. In the Court of Appeals there was no suggestion that the court acted both ways on prayer No. 12, or that this prayer was allowed, and, as

already stated, error was assigned for the rejection of the prayer (Opinion, Rec., p. 40). In view of (*a*) the exception to the rejection of the prayer; (*b*) the fact that no suggestion of contradiction in instructions was made to the trial court, or to the Court of Appeals; and (*c*) the assignment of error in the Court of Appeals for the rejection of the prayer, the statement in our opponent's brief (p. 10) that "the trial court granted the twelfth prayer of the defendant," is one which will not commend itself to this court, and requires an explanation not afforded by the brief.

We decline to argue the assignment on any theory which must assume that this twelfth prayer was given. We suggest, however, that the point not having been presented to the Court of Appeals, it will not be considered here.

Jordan Mining Co. *vs.* Société des Mines, 164 U. S., 261, 264.

II.

The Effect of the Architect's Certificate.

The fundamental objection of the defendant to the plaintiff's claim for damages for omissions and defects in the work, is that the architect, Palmer, certified, as shown in the record (p. 31), that the houses were completed, and that the work was done according to his interpretation of the plans and specifications, etc. Since the effect of this certificate must depend upon the contract, we direct the attention of the court to the following parts of the latter document. It is agreed, *first*, that the contractor will finish the houses *agreeably to the drawings and specifications* made by Melville D. Hensey . . . to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate. . . .

Second. That in consideration of the agreement *being strictly performed* by the contractor, Hensey shall pay $89,250, in instalments, as fixed in a signed schedule (p. 28).

Third. That in each case the payment shall be upon certificate of the architect. *"Said certificate, however, in no way lessening the total and final responsibility of the contractor," either for defective work, or work or materials not in accordance with the drawings and specifications.*

Fourth. "In all cases of doubt as to the *meaning of the drawings*, reference is to be made to the architect in charge, whose decision will be final."

There is no provision that the action of the architect shall be final or conclusive, except in the one case—*doubt as to the meaning of the drawings*—upon which point the court carefully guarded the defendant's rights (Rec., p. 35).

We concede that it is competent for parties to agree that the certificate of an engineer, architect, or other person shall be final and conclusive, and that in *such case*, and "in the absence of fraud, or such gross mistake as to necessarily imply bad faith, or failure to exercise an honest judgment, the action of the architect would be final." That this attribute of finality attaches only where the parties have so agreed, either in terms or by *necessary* implication, is clear from the decisions.

Cases of such *express* agreement for conclusiveness which are cited by the other side, are Boettler *vs.* Tendick, 5 L. R. A., 270; Sweeney *vs.* U. S., 109 U. S., 618; Railroad Co. *vs.* March, 114 U. S., 549; Railroad Co. *vs.* Price, 138 U. S., 185; Sheffield, etc., R. R. Co. *vs.* Gordon, 151 U. S., 287; while Kihlberg *vs.* U. S., 97 U. S., 400, is a case of necessary implication, treated by the court as an express agreement.

These cases and others are reviewed in Central Trust

Co. *vs.* Louisville, &c., Ry. Co., 70 Fed. Rep., 282, where, after pointing out that the provision for finality is found in the contracts in those cases where the certificate was held conclusive, the court says:

> "The court should not imply such an agreement, but should require clear and express language, because it is contracting away the right of the party to appeal to the courts of justice in case of a controversy" (p. 285).

Crane Elevator Co. *vs.* Clark, 80 Fed., 705, is not opposed to this view. The architect in that case refused to give a certificate, and the builder sued. The language of the syllabus quoted in the brief for plaintiff in error is not found in the opinion, which says only "That, with respect to *the matter submitted to the umpire*, his decision, is final and conclusive, etc." (p. 708).

Glacius *vs.* Black, 50 N. Y., 145, is exactly in point.

The contract provided that the materials should be of the best quality and the work done in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications. Held, the acceptance by the architect of a different class of work or of inferior material did not bind the owner. The court said:

> "In the first place the contract confers no power upon the architect to change or alter the plans and specifications. *Nor is there any provision found in many such contracts that the decision of the architect shall be final and conclusive.*"

See, also, to the same point:

Bond *vs.* Newark, 19 N. J. Eq., 376.
R. R. Co. *vs.* Wilcox, 48 Pa. St., 161.
Adlard *vs.* Muldoon, 45 Ill., 193.

And the question was considered by the Court of Appeals, D. C., in Fontano *vs.* Robbins (22 App. D. C., 253), where the contract provision was "under the direction and to the satisfaction of" the architects (p. 255). It was held that under such a contract the architect has no power to change the contract; that where the contract does not so provide, an architect is not the general agent of the owner, and has no power to change the plans of the work, and that such provision as that quoted "makes it the duty of the architect to see that the contract is complied with, not violated."

But however it may be in other cases where the architect, agent of the owner, accepts and certifies work as done according to the contract, in this case the certificate can not bind, because:

1st. The right of the owner, *notwithstanding a certificate*, to claim for bad work and inferior materials is expressly reserved to him.

2d. The certificate is so clearly wrong as to prove either fraud or such mistake by the architect as necessarily to imply bad faith, and for this reason is not binding.

Kihlberg *vs.* U. S., 97 U. S., 402.

The first point needs no elucidation. The parties were certainly competent to contract that the architect's certificates *should not be conclusive*, and this is precisely what they did, excepting only as to the meaning of *drawings* (not plans or specifications). No other meaning can be given the proviso (Rec., p. 28); it means this or it means nothing.

As to the second point. The jury found for the plaintiff $8,468.00 after allowing the defendant $29,032 under its pleas of set-off; that is, the plaintiff's total recovery was $37,500. If $16,500 claimed for delays (Rec., p. 7)

be deducted, it will be seen that for building defects the jury allowed $21,000.

These gross defects, amounting to about one-fourth the contract price, the architect ignored. His excuse is—

> "that a large part of the work was completed when he commenced his supervision; that he did not regard it as his duty to change conditions there, except where the brick work had been destroyed by vandalism, and tore nothing down unless it was in danger of falling down; that he had nothing to do with the work which was already done, and was only to superintend the completion of the work; that it was difficult for him to rectify work that was already done badly" (Rec., p. 32).

The certificate carefully avoids a statement that the work was done according to the requirements of the contract; but if it was so intended it can not, in the light of these statements, be taken either as the honest judgment of the architect, or as a certificate contemplated by the contract. The contract contemplated constant supervision of the work. This architect was appointed fifteen months after the contract was signed and when the work was nearly completed. The contract contemplated an honest expression of opinion from one, who, from personal observation of the work, knew the facts to be as certified. Mr. Palmer's testimony shows he recklessly certified to what he knew nothing of and considered not in his province, or that he knew the work to be badly done. This was a fraud, both in fact and in law.

Glacius *vs.* Black, 50 N. Y., 145.

We submit, then, that in granting the thirteenth prayer for instructions, which held the decision of Mr. Palmer on all doubtful questions between the drawings and specifications to be final, unless made in bad faith, the court gave the plaintiff in error all it could rightfully

claim; that there is no basis whatever for a contrary contention, and that the judgment should be affirmed.

We suggest that it is apparent that the writ of error in the cause was taken only for delay, and that damages therefor should be imposed.

Respectfully submitted.

ARTHUR A. BIRNEY,
HENRY F. WOODARD,
For Defendant in Error.

Supreme Court of the United States.

No. 245.—October Term, 1906.

The Mercantile Trust Company, Plaintiff in Error, vs. Melville D. Hensey. } In error to the Court of Appeals of the District of Columbia.

[April 8, 1907.]

The Mercantile Trust Company, by this writ of error, seeks to review a judgment of the Court of Appeals of the District of Columbia, affirming a judgment against it of the Supreme Court of the District for the sum of $8,468. The action was brought upon a bond for fifty thousand dollars, executed January 24, 1900, by the company as surety for one Jones, for the performance by him of a written contract entered into on the same date between him and the defendant in error, who was the plaintiff below, relative to the completion by Jones for the defendant in error of certain houses already in process of construction in the city of Washington. The condition of the bond was, in substance, that if the principal, Jones, should duly and faithfully perform and fulfill all the conditions of the contract entered into between him and the defendant in error the bond was to be void, otherwise to remain in force.

The contract provided that Jones, for the consideration mentioned therein, would within seven months from the date thereof well and sufficiently erect and replace all defective work and finish the twenty-one brick dwelling houses mentioned "agreeably to the drawings and specifications made by Melville D. Hensey, architect, and which plans and specifications are signed by the said parties hereto and hereunto annexed within the time aforesaid in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, and also shall and will find and provide such good, proper and sufficient material of all kinds whatsoever as shall be proper and sufficient for the completing and finishing all of said twenty-one houses and other works of the said buildings mentioned in the said specifications for the sum of eighty-nine thousand two hundred and fifty dollars, to be paid as set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part hereof." Hensey, "in consideration of the covenants and agreements

being strictly performed and kept by the said party of the second part as specified," agreed to pay the contractor the above-named sum "as the work progresses in the manner and at the time set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part of this agreement; provided that in each of the said cases a certificate shall be obtained from and signed by the architect in charge that the contractor is entitled to payment, said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work if it be afterwards discovered to have been ill done or not according to the drawings and specifications either in execution or materials; and, further, that the party of the second part shall furnish, if required, satisfactory evidence that no lien does or can exist upon the work." The last payment provided for in the contract was to be made "when the houses are fully completed in accordance with the said agreement and the plans and specifications prepared therefor."

All the materials were to be new and of the best quality, and the contractor was to "execute and complete all the work as set forth in the specifications and drawings in the best and most workmanlike manner." It was agreed that "in all cases of doubt as to the meaning of the drawings reference is to be made to the architect in charge, whose decision will be final."

Although this contract was entered into in January, 1900, and under it the houses were to be completed in seven months, yet, for some reason, Bates Warren, the person named in the contract, did not appoint an architect until April, 1901, when he appointed Mr. W. J. Palmer. The evidence given on the part of the plaintiff tended to prove that the contractor, Jones, abandoned the work on the houses early in the fall of 1900, leaving them uncompleted, and the work was otherwise carried on during the following winter, but that there was no architect in charge until Mr. Palmer's appointment. From that time Mr. Palmer seems to have in some degree superintended the work, and on the 29th of July, 1901, reported in writing to Mr. Warren the completion of the houses in question. In his letter Mr. Palmer said: "The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications it has been where the same were inconsistent and ambiguous, and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses."

This action was subsequently commenced for the purpose of recovering the damages which the plaintiff Hensey alleged he had sustained by reason of the failure of Jones to fulfill and carry out the contract. Issue being

duly joined between the parties, the plaintiff gave evidence tending to prove that the houses were not completed within the contract time, nor according to the plans and specifications in the particulars stated, and that the value of the houses was between two and three thousand dollars less on each house than it would have been had they been completed according to the contract, plans and specifications. The defendant duly objected to such evidence and took exceptions to its admission.

A verdict was rendered in favor of the plaintiff in the sum of $8,468, after allowing the defendant's claim of set-off of $29,032.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

After even more than the usual number of pleas, additional pleas, replications, rejoinders and demurrers, which are to be found in the pleadings in this District, the parties came to trial on the issues of fact, and the plaintiff recovered a verdict as stated. The judgment entered on the verdict was affirmed by the Court of Appeals. (27 App. D. C. 210.)

The grounds submitted in this court for the reversal of the judgment are reduced to two, set forth in the brief for the plaintiff in error, as follows:

"First, that the testimony of all the plaintiff's witnesses who testified in respect of deficiencies in construction being as to the total damage sustained by the plaintiff as the result of structural defects, defective materials and omissions, and the trial court having ruled that the jury should consider omissions alone, there was no basis upon which the jury could segregate damages caused by defective materials and damages caused by omissions so as to reach a verdict in accordance with the court's ruling.

"Second, that under the building agreement, the architect's certificate of completion should have been held to be final and conclusive of such completion, there being no evidence of fraud or bad faith on his part."

In regard to this first ground of reversal the record is at first sight somewhat confused. The plaintiff in error asserts that there was no evidence given segregating the items upon which the sum total of the damage was arrived at; that the evidence given on the part of the plaintiff was that the houses were each worth between two and three thousand dollars less on account of the failure of plaintiff in error to fulfill the conditions of the contract, but that it is impossible to discover from that evidence what amount of the damage was due to omissions, what amount to structural defects and what amount to defective material; and, as the court instructed the jury that in considering the question of structural defects they were not at liberty to consider anything but omissions and were not entitled to consider substitutions of material or modifications of construction made with the approval of the architect under his interpretation of the plans

and specifications, there was in reality no evidence before the jury upon which they could have estimated the damages under the instruction given them by the court; that all the witnesses testified simply as to the total diminution in value, as a result of the three items mentioned—omissions, structural defects and defective material—while the court charged, agreeably to the twelfth request of the plaintiff in error, that they were at liberty only to consider damages resulting from omissions.

The twelfth prayer of the plaintiff in error, which its counsel asserts was granted by the court, is as follows:

"The jury are instructed that, in considering the question of structural defects, they are not at liberty to consider anything but omissions, if any they find, and are not entitled to consider substitutions of materials or modifications of construction made with the approval of the architect, under his interpretation of the plans and specifications."

There are several answers to the first ground urged by the plaintiff in error for a reversal of this judgment.

(1) It does not appear that there is any basis in the record for the assertion of the plaintiff in error that there was no evidence given showing the amount of damage sustained from each of the breaches of the contract, but only a statement of the sum total sustained by reason of all the breaches. The bill of exceptions does not purport to set forth all the evidence given upon the trial of the case. There is a general statement that the plaintiff in error gave evidence by several witnesses that the houses were not completed according to the plans and specifications in the contract, in the particulars set forth in the assignment of breaches, and that the value, by reason of the omissions, structural defects and defective materials, was from two to three thousand dollars less on each house than it would have been had they been completed according to the contract, plans and specifications. This is not at all equivalent to saying that there is no evidence except as to the total damage. It is much more probable that on the trial such evidence was given, and that the statement in the bill is simply a summary of the total amount of damage, which the evidence showed in detail had been sustained from each particular breach. It does not mean that there was no evidence of the amount of the damage caused from each breach that was proved. It is very improbable that the case was tried in any such manner. The amount of damage on account of each breach that was proved would most naturally have also been proved as part of the case.

It is part of the duty of a plaintiff in error affirmatively to show that error was committed. It is not to be presumed, and will not be inferred from a doubtful statement in the record. We think in this case the

record fails to show the absence of the evidence as argued by the plaintiff in error.

(2) If, however, we assume that there was no such evidence in detail and only a conclusion given as to the total amount of damage, and if we further assume that the twelfth request of the plaintiff in error was charged by the court, and the right of recovery was thereby limited as stated, it does not appear that the plaintiff in error made any point on the trial of the absence of the evidence of damage in detail, or that the court was asked to direct a verdict for the defendant on account of its absence. If there were no evidence of the amount of damage caused by each particular breach, but only of the total amount sustained, and the plaintiff in error desired to avail itself of that objection to a recovery for the particular damage permitted, counsel should have called the attention of the court to the point, and requested a direction of a verdict for the defendant on that ground. No such request was made, and nothing was said which would show that counsel for the plaintiff in error had any such objection in mind, and he cannot argue an objection here which was never taken in the trial court.

(3) In truth the court did not limit the recovery of damages, as is set forth in the above-mentioned twelfth request to charge, but permitted a recovery for the total sum of the various items proved.

The defendant in error insists that the twelfth request, instead of being charged, was in fact refused by the court. We think that in this assertion the defendant in error is perfectly right. Some little confusion at first appears on looking in the record, caused by a mistaken reference to the request which was charged, but a more careful perusal of all that appears regarding the charge of the court, and the requests and refusals to charge, bring us to the conclusion that there is not the slightest doubt that the court refused the twelfth request, instead of charging it. In such case there was no occasion for segregating the items of damage proved.

This leaves the argument of the plaintiff in error upon the first ground wholly without merit.

The other ground taken for a reversal in this case is that the architect's certificate of July 29, 1901, was conclusive between the parties and was a bar to the maintenance of this action.

Mr. Palmer, in his letter or certificate, reported the completion of the buildings according to his interpretation of the plans and specifications, and that where deviations had been made from them it was where the same were inconsistent and ambiguous, and in all cases of inconsistency and ambiguity the work had been done according to the interpretation most beneficial to the houses.

We do not think this certificate was conclusive, and it did not, therefore, bar the maintenance of this action. The language of the contract,

upon which the claim is based, is set out in the foregoing statement, and while it provides that the work shall be completed agreeably to the drawings and specifications made by M. D. Hensey, architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, it omits any provision that the certificate shall be final and conclusive between the parties. In other words, the contract provides that before the builder can claim payment at all he must obtain the certificate of the architect; but, after such certificate has been given, there is no provision which bars the plaintiff from showing a violation of the contract in material parts, by which he has sustained damage. A contract which provides for the work on a building to be performed in the best manner and the materials of the best quality, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive, and will not bind the owner, or relieve the contractor from the agreement to perform according to plans and specifications. (*Glacius* v. *Black*, 50 N. Y. 145; *Fontano* v. *Robbins*, 22 App. D. C. 253.)

There is also in the contract the provision already mentioned in the statement of facts in regard to payments as the work progressed, which showed that a certificate was to be obtained from and signed by the architect in charge before the contractor was entitled to payment, but it was provided that the certificate should "in no way lessen the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications either in execution or materials." There is the further positive agreement of the contractor to execute and complete all the work as set forth in the specifications in the best and most workmanlike manner, and also that final payment is to be made only when the houses are completed in accordance with the agreement and the plans and specifications prepared therefor.

The whole contract shows, in our opinion, that the certificate that the houses had been completed according to the contract and its plans and specifications was not to be conclusive of the question, and the plaintiff was not thereby precluded from showing that in fact the contractor had not complied with his contract, and the plaintiff had thereby sustained damage. The cases cited in the opinion of the court below, *Fontano* v. *Robbins*, 22 App. D. C. 253; *Bond* v. *Newark*, 19 N. J. Eq. 576; *Memphis &c. R. R. Co.* v. *Wilcox*, 48 Pa. St. 161; *Adlard* v. *Muldoon*, 45 Ill. 193, are in substance to this effect. To make such a certificate conclusive requires plain language in the contract. It is not to be implied. *Central Trust*

Co. v. *Louisville &c. R. R. Co.* 70 Fed. Rep. 282, 284. The cases of *Sweeney* v. *United States*, 109 U. S. 618; *Martinsburg &c. Railroad Co.* v. *March*, 114 U. S. 549; *Chicago &c. Railroad Co.* v. *Price*, 138 U. S. 185; *Sheffield &c. R. R. Co.* v. *Gordon*, 151 U. S. 285, were all cases in which the contract itself provided that the certificate should be final and conclusive between the parties.

The only case in which the certificate of the architect or his decision was by the contract made final was in case of doubt as to the meaning of drawings, in which case reference was to be made to the architect in charge, whose decision was to be final.

Both grounds urged by the plaintiff in error in this court for reversal of the judgment are untenable, and it must therefore be

Affirmed.

Mr. Justice BREWER took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.